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PLEBISCITES, PARTICIPATION, AND COLLECTIVE ACTION IN LOCAL GOVERNMENT LAW

Clayton P. Gillette*

I. INTRODUCTION

Participation is again in the air. Apparently fueled by current debates concerning decentralized power¹ and republican versus pluralist traditions in our political and legal theory,² those concerned with political decisionmaking have turned their attention to calls for increased public involvement in the process. As has been true in the past,³ the objectives of those who advocate increased participation are by no means uniform. Some stress the positive effects that broad participation would have on individual participants. The primary function of participation in these accounts lies in its educative value, its capacity to produce a more informed, hence more self-sufficient, citizenry.⁴ On this view, participation is not necessarily related to constructing political consensus. Instead, participation may be a mechanism for self-expression and the participatory forum becomes a place for disputation. Others express more concern for the social welfare effects of participation. Their argument suggests that participa-

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1. See Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837 (1983).

2. See, e.g., Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

3. For general reviews of the classical literature of participation, see P. BACHRACH, *THE THEORY OF DEMOCRATIC ELITISM* (1967); C. PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970); J. PENNOCK & J. CHAPMAN, *NOMOS XVI: PARTICIPATION IN POLITICS* (1975).

4. While several writers stress the individual benefits of participation, they do not necessarily agree on the substance of those benefits. John Stuart Mill argued that the educative benefits of political participation would generate substantial carryover into purely personal affairs. See C. PATEMAN, *supra* note 3, at 28-30. Hannah Arendt, on the other hand, viewed political participation as a good unto itself, essential to the achievement of "public happiness." The public realm in which politics took place was "the only place where men could show who they really and inexchangeably were." H. ARENDT, *THE HUMAN CONDITION* 41 (1958).

tion will create a communitarian atmosphere in which decisions transcend individual interest and reflect instead the interdependence of those who constitute the community.⁵

These justifications converge, however, in their recognition that meaningful participation cannot occur in the national polity.⁶ The role of individuals at that level consists primarily of selecting representatives who serve as actual decisionmakers. The conventional response has been to look to relatively small units of government, localities, to serve as the forums for public participation. Even at the local level, however, direct participation in the political process seems anomalous. The town meeting model of government has little application to contemporary municipalities, and even the Jeffersonian appeal to turn the counties into wards⁷ seems inappropriate for the wide variety of local problems that require regional or interjurisdictional solutions.

Advocates of increased mass participation, therefore, generally recommend mechanisms more passive than direct entry into the public forum by large numbers of citizens. Most frequently, commentators

5. See, e.g., B. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (1984); M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); Frug, *supra* note 1. The immediate precursor to recent expressions of this sentiment is the *Port Huron Statement* issued by Students for a Democratic Society in 1962. *Port Huron Statement*, reprinted in J. MILLER, "DEMOCRACY IS IN THE STREETS": FROM PORT HURON TO THE SIEGE OF CHICAGO 329 app. (1987). That document bemoaned the isolation of individuals that could mean "the rise of a democracy without publics," and concluded: "With the great mass of people structurally remote and psychologically hesitant with respect to democratic institutions, those institutions themselves attenuate and become . . . progressively less accessible to those who aspire to serious participation in public affairs." *Id.* at 336. Miller's book provides a good history of the *Port Huron Statement*.

The distinction between the two justifications for participation may be more subtle than I have suggested. Mill, for instance, clearly believed that increased participation would induce other-regarding behavior. C. PATEMAN, *supra* note 3, at 29-30. Arendt also believed that private interests would be tempered by participation in the public realm. H. ARENDT, *ON REVOLUTION* 256-57 (1963). See also note 82 *infra*. Nevertheless, the communitarian writers explicitly reject the individualistic liberalism that serves as the starting point for Mill and his successors.

6. See generally R. DAHL & E. TUFTE, *SIZE AND DEMOCRACY* (1973). There are, however, occasional arguments for national referenda. See, e.g., B. BARBER, *supra* note 5, at 281-89.

7. Letter from Thomas Jefferson to John Cartwright (June 5, 1824), reprinted in *MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON* (T. Randolph ed. 1830). Jefferson urged the "subdivision of our counties into wards" in a proposed constitution for Virginia and analogized wards to the hundreds created prior to the Norman invasion. In Jefferson's model, each ward would comprise approximately six square miles and would provide its own company of militia and police force. In short, "each ward would thus be a small republic within itself, and every man in the state would thus become an acting member of the common government, transacting in person a great portion of it's [sic] rights and duties, subordinate indeed, yet important, and entirely within his competence." *Id.*

For a modern defense of the town meeting model of democracy, see J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* (1980).

suggest plebiscitary processes — initiatives and referenda⁸ that permit direct legislation without requiring gatherings in which all decisionmakers meet simultaneously. Proponents of these processes presume that plebiscites accommodate participation within the constraints of technical feasibility. The plebiscite, however, is not without its detractors, even among those otherwise sympathetic to participatory processes. These objections take a variety of forms, but they make essentially the same claim: Plebiscitary processes are *less* likely than representative ones to generate decisions that reflect common conceptions of the public interest or social welfare.⁹ In this article I consider that comparative claim and conclude that, at least in discrete areas with identifiable characteristics, criticisms of plebiscites both understate the capacity of participation and overstate the capacity of legislative processes to serve public interest.

By “public interest” I do not mean a single conception of the good on which all informed individuals would agree. Instead, I mean to suggest that individual decisionmakers acting in the public interest would be able to justify their decisions by reference to the resulting increased welfare for society at large.¹⁰ Obviously, very different results, each of which could be justified in terms of the “public interest,” could be advocated under this definition. For instance, a decision to concentrate municipal services in the wealthy area of town could be supported by arguing that productivity of public resources is thereby being maximized, or attacked by contending that redistributive effects are thereby being sacrificed.¹¹ Indeed, the concept is rendered even more nebulous if each individual’s conception of “public interest” is informed by belief about what would serve his or her private interest.¹² My definition of “public interest,” however, does contain some substantive requirements, primarily by excluding certain conduct or motives.¹³ It would, at a minimum, preclude decisionmaking predi-

8. See, e.g., Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 SUP. CT. REV. 341, 403.

A referendum is a popular vote approving or disapproving prior legislative action. An initiative is a popular vote to enact a law without additional legislative action.

9. See J. ELSTER, *SOUR GRAPES* 37-42 (1983) (general litany of objections to participatory processes).

10. See R. FLATHMAN, *THE PUBLIC INTEREST* (1966). Cf. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 228 n.29 (1986) (defining “public-regarding legislation” by reference to procedure used in legislative passage of law).

11. See Behrman & Craig, *The Distribution of Public Services: An Exploration of Local Governmental Preferences*, 77 AM. ECON. REV. 37 (1987).

12. See J. ELSTER, *supra* note 9, at 148-57 (self-interest may generate self-deception and thus distort beliefs from what would otherwise be inferred from available evidence).

13. There are other situations in which commentators have attempted to define nebulous

cated solely on Elster's "interest-induced beliefs"¹⁴ or what Schumpeter termed "extrarational or irrational prejudice and impulse."¹⁵ Further, legislation predicated on public interest typically attempts to frustrate efforts to expropriate wealth from others to satisfy the desires of the expropriator rather than to achieve net social benefits. But legislation motivated by public interest need not involve conflicts among competing interests; it may also consider issues on which there exists basic agreement about optimal results, but on which coordination of individual efforts is frustrated by mistrust or transactional obstacles. The result of such coordination failure is the attainment of a social result favored by none of the society's members. Thus, I understand "public interest" broadly (if vaguely) to comprise behavior that minimizes expropriation (rent-seeking) or maximizes coordination.

At one level, the critics' conclusion that plebiscites are less likely than representative processes to solve problems of expropriation and coordination seems seriously counterintuitive. Insofar as public interest is considered to reflect the aggregate of individual interests, direct democracy would appear tautologically to provide a superior means for registering and implementing social welfare functions. Even if we acknowledge substantial doubt about whether any voting procedure can reflect actual aggregate preferences — because aggregation procedures necessarily confuse rankings among preferences — it is unclear that the problem affects participatory processes more than representative ones.¹⁶ Indeed, the communitarian perspective on the problem suggests not only that decisions made under direct democracy will reflect the aggregate interests of constituents, but that those decisions will be informed by increased regard for others that is unavailable where representation isolates individuals from politics.¹⁷ Implicit in the critique of plebiscites, therefore, is the belief that something more than mere aggregation is required to reach optimal social decisions. Some of these concerns appear to be predicated on an understanding that universal and rational pursuit of self-interest does not necessarily

legal phrases as "excluders." See, e.g., Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 196 (1968).

14. J. ELSTER, *supra* note 9, at 148-57.

15. J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 262 (1976).

16. Compare W. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE (1982) (arguing that the possibility of manipulation and ambiguous results renders democratic voting procedures essentially meaningless), with Coleman & Ferejohn, *Democracy and Social Choice*, 97 ETHICS 6 (1986) (suggesting representative processes are susceptible to similar criticisms).

17. See, e.g., B. BARBER, *supra* note 5, at 197-98; M. SANDEL, *supra* note 5, at 172-73.

generate an optimal collective result.¹⁸ Self-interested incentives to free ride, to overuse common property,¹⁹ or otherwise to expropriate the wealth of others for personal gain lie at the root of what Russell Hardin has so aptly termed "the back of the invisible hand."²⁰ But others skeptical of achieving public interest are less concerned with the ability of citizens to act in an other-regarding fashion than with the ability (of even the most well-meaning) to act in a manner that reflects any consistent, rational calculus of public welfare. Obstacles may emerge from preferences that are either uninformed or informed by erroneous or irrational concepts.²¹ Individuals may have adapted their preferences either to existing circumstances or to circumstances that they believe readily achievable rather than to ideal situations that would be preferred after a comprehensive search of alternatives;²² they may adhere to preferences out of addiction rather than through rational contemplation of alternatives;²³ they may form preferences predicated on a belief that what they do not currently possess is preferable to what they do possess, a "grass is greener on the other side" syndrome.²⁴ Alternatively, they may fail to express their true preferences in the voting booth, so that electoral results deviate from the general will.

The inquiry into superior modes of decisionmaking, then, recognizes these defects of coordination failure, expropriation, and irrationality and asks whether participatory or representative processes best neutralize their effects. It may well be that a perfect direct democracy — in which all affected parties meet to debate and resolve an issue — would best accomplish this goal. Communal decisionmaking on significant matters might advance both objectives of limiting opportunistic behavior and increasing rationality. Discussion incident to decisionmaking might produce recognition of and confrontation with irrational motives and prejudices. Responsibility for a wide variety of substantive matters might also induce individuals to step forward and register their (now rationally informed) preferences.²⁵ For current

18. See F. FROHOCK, *RATIONAL ASSOCIATION* 20-30 (1987).

19. But see Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

20. R. HARDIN, *COLLECTIVE ACTION* 6 (1982).

21. See J. ELSTER, *supra* note 9, *passim*.

22. *Id.* at 109-11; H. SIMON, *ADMINISTRATIVE BEHAVIOR* 64-66 (3d ed. 1976); March, *Bounded Rationality, Ambiguity, and the Engineering of Choice*, 9 BELL J. ECON. 587 (1978).

23. J. ELSTER, *supra* note 9, at 120-21; A. HIRSCHMAN, *SHIFTING INVOLVEMENTS: PRIVATE INTEREST AND PUBLIC ACTION* 101-02 (1982).

24. J. ELSTER, *supra* note 9, at 123-24.

25. Certainly this is part of the claim made by Benjamin Barber for "strong democracy,"

purposes, I am willing to be agnostic, even supportive, of these objectives. Indeed, should they be achieved, many of the conclusions that I reach in this article — particularly those dependent on assumptions of self-interested actors — would be diluted. But the objections to plebiscites and, I hope to show, the responses to those objections rely on less utopian conceptions of human nature and less complete realizations of participatory democracy. The assumption of self-interest does not mean that individuals will not consider the interests of others in deciding a course of conduct, but only that such behavior must ultimately be induced by appeals to self-interest. Furthermore, retaining the assumption of self-interest appears the only way to avoid a nontautological resolution of the objections to referendum and initiative. For those objections similarly rely on assumptions about self-interested actors. If we reject that assumption, the debate over the propriety of plebiscites quickly approaches closure with a stalemate over underlying assumptions. Granting the presence of self-interested actors permits the debate to proceed along common ground.

My focus on plebiscites, rather than on full realizations of direct democracy, is similarly based on a desire to avoid falsely utopian solutions and to consider the most compelling arguments against participation. Representative government is too entrenched, and arguably too vital, for us to believe that anything approaching direct democracy is feasible, even at the local level. Referendum and initiative appear to be the only meaningful halfway houses available to localities that desire some increased popular role. Thus, the objections to participatory democracy do not necessarily reject either the educative or communitarian goals sought by advocates of participation.²⁶ Instead, they rely on the consequences of satisfying these goals incompletely. In essence, these objections contend that if the ideals of increased participation cannot be perfectly realized, it does not necessarily follow that enhancement of as much democracy as is possible under current circumstances is a desirable alternative. This argument, obviously related to the economic theory of the second best,²⁷ suggests that pockets of public participation may produce results inferior to those of a wholly rep-

characterized by "common talk" and "common decision." See B. BARBER, *supra* note 5, at 204, 224.

26. But see J. ELSTER, *supra* note 9, at 40-41 (participation may mean conformity to a bad result). Concern about conformity also appears to underlie George Kateb's argument that direct democracy requires too much "citizenship" in a manner that reduces individual diversity and imposes a "moral cost" of "the death of autonomy." See Kateb, *The Moral Distinctiveness of Representative Democracy*, 91 ETHICS 357, 373 (1981).

27. See G. CALABRESI, *THE COSTS OF ACCIDENTS* 86-88 (1970); Lipsey & Lancaster, *The General Theory of the Second Best*, 24 REV. ECON. STUD. 11 (1956).

representative system. If plebiscites provide opportunities for individuals to register preferences, but fail to provide the educative atmosphere that underlies arguments for increased participation, then popularly obtained results, predicated on irrationality and self-interested desires to expropriate or eschew cooperation, might deviate substantially from any conception of public interest.

The implications of imperfect democracy have generated several objections to plebiscites. What I find interesting, however, is that the primary objections substantially conflict with one another. On the one hand, those who oppose direct democracy argue that plebiscites permit the most tyrannical form of majoritarianism. Plebiscites take an undifferentiated view of preferences, so individuals may vote their prejudices, free from the constraints of reasoned conversation, and have those biases respected as preferences to be aggregated along with all others.²⁸ The raw aggregations are, allegedly, likely to ignore the interests of the minority. These claims can reach absurd proportions, portraying voters as unique among decisionmakers in their capacity for venality and malice.²⁹

Simultaneously, other opponents claim that plebiscites can too easily be captured by special interests that substitute minority objectives for majoritarian goals.³⁰ Here the concern is that participatory legislative processes are initiated and financed by groups to serve their personal interests, but not necessarily the public interest. According to this strand of antiparticipatory thought, these expropriators are capable of capturing the electorate, convincing some that their proposals will serve the voters' interests, while those who remain unpersuaded are affected too slightly by the outcome to register any preference at all. Indeed, some commentators endorse both objections, apparently oblivious to their inherent conflict. Thus, Derrick Bell has expressed concern about the tendency of popular democracy for "majority dicta-

28. See D. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* (1984); Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373 (1978); Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); Sirico, *The Constitutionality of the Initiative and Referendum*, 65 IOWA L. REV. 637, 641 (1980).

29. See, e.g., Seeley, *The Public Referendum and Minority Group Legislation: Postscript to Reitman v. Mulkey*, 55 CORNELL L. REV. 881 (1970). Seeley argues that "the referendum differs from other legislative methods because it provides a procedure whereby legislative decisions can be made exclusively along the lines of racial prejudice." *Id.* at 902. One wonders what nonracial motivations generated the variety of laws concerning miscegenation and public facility segregation that were passed by legislators.

30. See D. MAGLEBY, *supra* note 28, at 8; Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505 (1982).

torship,"³¹ but simultaneously feared the use of referendum by "relatively small, organized groups,"³² the capabilities of which, one might imagine, would actually facilitate the interests of the racial minorities that Bell wishes to foster.³³

I believe these objections are not only contradictory, but largely overstated. My negative reaction is predicated on a belief that we rely on representatives to render decisions not because they are innately fairer or more other-regarding than their constituents, but because the representative process provides numerous checks on purely selfish conduct.³⁴ The availability in the plebiscitary process of similar checks on the conduct of constituents generally, or — more precisely — of those constituents who are likely to vote in a referendum or initiative, would substantially close the gap between the quality of participatory and representative decisionmaking. This is not to say that the decisions will be the same; nor is it to suggest that there is no reason to favor one process over the other. If nothing else, a desire to reduce transaction costs or to facilitate monitoring of decisionmakers may militate in favor of a representative procedure.³⁵ If we consider legislators to be lawmaking specialists, we might best be served by allocating that function to them while the laity pursues its own specialties.³⁶ But if we can discover checks on expropriation or irrationality, or incentives for coordination within participatory processes, the systematic disfavoring of plebiscites as supportive of immoral or narrowly considered results would be unwarranted.

In the next Part of this article, therefore, I will suggest that the concern for raw majoritarianism fails to consider the costs associated with voting in a plebiscite, costs that make it unlikely that the majority will vote at all. I shall therefore explore whether the electorate, or that part of it most likely to vote in a plebiscite, is also likely to consider the public interest. Here I will argue that public choice theory inade-

31. Bell, *supra* note 28, at 16.

32. *Id.* at 15 n.54.

33. See Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (arguing that "discrete and insular minorities" can and do organize effective interest groups).

34. See Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984). Jonathan Macey suggests that judicial review may serve a similar function. See Macey, *supra* note 10.

35. See Coleman & Ferejohn, *supra* note 16, at 9. For an argument that agency costs imposed by representation are not major, see Peltzman, *Constituent Interest and Congressional Voting*, 27 J.L. & ECON. 181 (1984). Other reasons exist for occasionally favoring a legislative process. See text at notes 109-10 *infra*.

36. However, there is some evidence that those who draft the language of plebiscites are also "professionals" or specialists in the subject matter at issue. See D. MAGLEBY, *supra* note 28, at 60; Lowenstein, *supra* note 30, at 551-52.

quately distinguishes between individual motivations to undertake an action (voting) at all and motivations to implement that action in a specific way (deciding how to vote). Consequently, the theory fails to consider the circumstances in which we would anticipate other-regarding behavior in the voting booth. My analysis, however, recognizes that participation for some may be driven by intense self-interest in results that are contrary to the public interest. Part II concludes, therefore, with an inquiry into whether these tendencies for noncooperation or expropriation can be neutralized in plebiscites that exhibit particular characteristics.

Part III considers the negative implication of the argument that majorities fail to vote, *i.e.*, that special interests can readily capture the electorate. Those who have most to gain from legislation will be motivated to act, at least if their group is capable of overcoming obstacles of free riding.³⁷ I recognize that the threat of minority legislation does exist; but those who criticize plebiscites on this basis fail to consider the possibility of constraints on those who favor a referendum. I suggest that state constitutional, statutory, and judicial limits on the referendum are properly understood as restricting plebiscites to issues that exhibit the salient features that generate publicly interested results. Further, I argue that the objection ignores the extent to which legislatures are similarly susceptible to entreaties of special interest groups. If the legislature is as or more likely than the general electorate to be captured by special interests, then the fear that plebiscites will generate inordinate special interest legislation is unfounded.

The prior paragraphs suggest that claims about plebiscites are comparative. Those who oppose direct democracy do not contend that legislative processes consistently produce optimal results. Nor do they argue that those voting in plebiscites are motivated solely by prejudice. Rather, the implicit claim is that representative democracy is likely to produce results that deviate *less* from optimal outcomes than plebiscitary processes. One would imagine, then, that my contrary claim is susceptible to empirical demonstration. Alas, I can make none. As I have suggested above, the vagueness of the "public interest" standard defies the creation of a common metric by which one could easily measure representative or plebiscitary deviations from the ideal. Thus, I have attempted neither to count cases of public or private interest legislation nor to devise an experiment that those more

37. See W. BAUMOL, *WELFARE ECONOMICS AND THE THEORY OF THE STATE* 90-93 (1952). On the effects of group size, see N. FROHLICH, J. OPPENHEIMER & O. YOUNG, *POLITICAL LEADERSHIP AND COLLECTIVE GOODS* 145-50 (1971); M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* 43-52 (1965); R. HARDIN, *supra* note 20, at 38-49.

empirically minded might employ. My objective instead is to indicate the existence of incentives in the legislative and plebiscitary processes that would tend to favor conduct consistent with public or private interest.

II. RAW MAJORITARIANISM

Each of the primary arguments against participatory processes (raw majoritarianism and the advent of special interest legislation) implicitly premises its conclusion that plebiscites are insidious on the belief that, as a relative matter, voters (though not necessarily representatives) are narrowly self-interested and that their representatives (though not necessarily voters) overcome self-interest through the representational process. In consequence, voters are likely to surrender to unreasoned prejudice and narrow conceptions of self-interest where legislators would not. The likelihood that majorities will act in this manner is increased by the perception that voters, being unaccountable to others for their expressed preferences and able to vote privately and without public justification, will eschew the deliberative processes that presumably characterize legislative lawmaking. Rather than becoming educated and engaging in reasoned debate over issues, voters will — on this view — vote what Schumpeter called their “dark urges.”³⁸ Majorities that share similar prejudices or interests will be able to impose their will on minorities without constraint, even though the injuries consequently suffered by the minority outweigh the benefits to the majority. Coalitions of like-minded voters, therefore, are both willing and able to oppress extraneous dissenters. Moreover, voters will be faced with a binary choice: they can vote for a proposition or against it. Unlike legislators, they have no opportunity to effect bargains or compromises that might moderate a proposition’s language or impact, or make it more palatable. Briefly stated, these are the offen-

38. See J. SCHUMPETER, *supra* note 15. It is difficult to know whether Schumpeter’s fears would be exacerbated or mollified by participatory processes. His concern was born of a general distrust of decisionmaking by those who did not have an immediate interest in the outcome of an issue. See *id.* at 256-62. Nevertheless, the public’s lack of interest seemed, for Schumpeter, to emerge from the absence of responsibility. It was for this reason that “the typical citizen drops down to a lower level of mental performance as soon as he enters the political field. He argues and analyzes in a way which he would readily recognize as infantile within the sphere of his real interests.” *Id.* at 262. Arguably, the grant of decisionmaking responsibility to individuals would increase their interest in the outcome of an issue and thus engender greater attention to the underlying arguments that would affect a rational vote. I am not suggesting that Schumpeter would have endorsed greater public participation; he disfavored public participation, including expressions of popular opinion intended to influence legislators. See *id.* at 295. For Schumpeter, democracy meant “only that the people have the opportunity of accepting or refusing the men who are to rule them.” *Id.* at 285. See also P. BACHRACH, *supra* note 3, at 17-21 (arguing that Schumpeter’s theory reduces democracy from an ideal to a mere “political method”).

sive elements of raw majoritarianism. In this Part, I want to examine both the premises of this objection to participatory politics and the conclusions drawn from those premises.

It seems helpful, at least at the outset, to grant the underlying assumption that legislators are primarily motivated by the public interest. Substantial learning in public choice theory contradicts this assumption and suggests that legislators are motivated by the same self-interest that permeates private markets; the only difference is that the currency in which legislators trade is not legal tender, but votes and political support. Legislators are susceptible to influence from groups that can deliver sufficient support to maintain the legislator in office or facilitate advance to a more desired office. I do not want to minimize the importance of this literature; it addresses, however, the issue raised in the succeeding section of this article. For the moment, it seems most useful to grant the basic premise that legislators do act in accordance with public interest and then investigate the relative capacity of their constituents for similar conduct. Nevertheless, I shall relax that assumption where doing so demonstrates particular disadvantages of the representative process.

A. *The Tradition of Anti-Participatory Thought*

The sentiment that participatory government reduces to raw majoritarianism has a long tradition in American political theory. Its origins trace to Madison's concern for faction, expressed in *Federalist* No. 10. It was through representation that those elected to office, implicitly of superior morality than their constituents, could "refine and enlarge the public views."³⁹ It was through the representational process, therefore, that the "public voice" could "be more consonant to the public good than if pronounced by the people themselves."⁴⁰ While Madison recognized the possibility that "[m]en of factious tempers, of local prejudices, or of sinister designs" could attain office and betray the public trust, he contended that this result was unlikely in the large republic, as "unworthy candidates" would have less success in persuading large numbers of voters.⁴¹

Although Madison's concern did not lie with local government processes, his argument embodies the view that large republics are better able to dilute the effects of faction than small ones, presumably by permitting representation of more diverse points of view. The negative

39. THE FEDERALIST No. 10, at 60 (J. Madison) (P. Ford ed. 1898).

40. *Id.*

41. *Id.* at 60-61.

implication of his argument is that the comparative advantage of legislative decisionmaking dissipates at the local level. Legislative bodies could be too small to include all interests within the community; the constituencies they represent could be too small to reflect the diverse interests affected by local action. The result could be domination by a particular faction and subsequent corruption, facilitating "a common motive to invade the rights of other citizens."⁴² Nevertheless, Madisonian theory strongly suggests that representative bodies are necessary, if not sufficient, to transcend faction. Thus, even if Madison expressed a preference for "large" rather than "small" republics, one may readily infer that the theory prefers small representative bodies to local electorates. Only the former contains the filter necessary to balance interests and frustrate action born of self-interest. Should public-spirited action be necessary, it is only within the representative body that a majority willing to undertake the task can likely be found.⁴³

Similar sentiment occupies de Tocqueville's conception of the tyranny of the majority. For de Tocqueville, the omnipotence of the majority served as the greatest threat to freedom in the "American republics." Indeed, not even the legislature was to be trusted, as it "represents the majority and obeys it blindly."⁴⁴ But here the idiosyncratic capabilities of local governments appear quite salutary. For de Tocqueville, localities form administrative functionaries, necessary to execute the directives of centralized authority.⁴⁵ This administrative role, however, also provides a buffer against the excesses of centralized government. Thus, de Tocqueville suggests that localities constitute pockets of liberty that remain open against laws enacted by an oppressive majority.⁴⁶ That effect, however, is due to the absence of centralized administration rather than the bona fides of the populace. On that issue, de Tocqueville seems no more sanguine than Madison: "I

42. *Id.* at 62. See Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 854-55 (1983).

43. See H. PITKIN, *THE CONCEPT OF REPRESENTATION* 195 (1967). Carol Rose has suggested to me that Madison's concern for faction might have led him to favor plebiscites at the local level, as local representative bodies could be small enough to permit domination by particular interests. I believe there is something to this position, as I indicate in Part III of this article. Madison, however, appears to have had little affection for plebiscitary democracy, and feared the "danger of disturbing the public tranquility by interesting too strongly the public passions." See *THE FEDERALIST*, *supra* note 39, No. 49, at 336 (J. Madison).

44. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 233 (J. Mayer & M. Lerner eds. 1966).

45. *Id.* at 241-42. For John Stuart Mill, the role of administrative functionary was appropriate because local bodies and officials could not be trusted with the public welfare beyond activities that constituted "business purely local," e.g., the paving, lighting, and cleaning the streets of a town. See J.S. MILL, *ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 278-90 (R. McCallum ed. 1946).

46. A. DE TOCQUEVILLE, *supra* note 44, at 241-42.

think that the rareness now of outstanding men on the political scene is due to the ever-increasing despotism of the American majority."⁴⁷ As with Madison, it is not the innate goodness of the people that serves public interest; to the contrary, that end is achieved by devising institutions capable of frustrating self-interested action.

The implications of this model of raw majoritarianism underlie much of the resistance to the plebiscite. If one seeks socially optimal decisions, decisionmaking by uninformed, unaccountable, and prejudiced voters runs a distant second to decisionmaking by those within the alternative model, *i.e.*, informed, publicly interested legislators who are constrained by their office to explain their votes and who are discouraged from registering preferences prior to considering relevant information.⁴⁸ This deliberative model of legislative decisionmaking is an appealing ideal, and undoubtedly exists to a substantial degree.⁴⁹ Nevertheless, the strength with which it is touted seems odd in light of the assumptions that underlie the comparative judgment about legislators and voters. For if self-interested voters are not to be trusted to select legislation that corresponds to a social optimum, it is unclear why their judgment is more commendable in the selection of representatives. On its face, it would seem that just as raw majorities could pass legislation characterized by prejudice and self-interest, they could elect representatives similarly unwilling to engage in the reflective processes relied on to mitigate electoral narrowness. In the absence of some assurance that persons running for public office are publicly interested, nothing in the process of *being* a representative indicates that narrow self-interest of the constituency will be overcome.⁵⁰

47. *Id.* at 237.

48. The alternative is not limited to legislators. Frederick Schauer documents what he terms "contemporary distrust of juries" in free speech cases, so that judges become the proper arbiters of what speech is to be protected. See Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761, 765-68 (1986).

49. See, e.g., Kalt & Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984). However, the limitations of the deliberative model may be pronounced, especially at the state and local level where legislative history is largely nonexistent, legislators hold other, full-time jobs, and legislation is frequently passed en masse without debate. See Briffault, *Distrust of Democracy* (Book Review), 63 TEXAS L. REV. 1347, 1362 (1985).

50. Hanna Pitkin's reading of Madison suggests that the puzzle is less apparent than I have indicated. She concludes Madison is less concerned with the moral or political superiority of representatives than with their capacity to withstand action based on factious interests. This capacity emerges from the balancing function played by representatives, from their representation of diverse groups whose interests conflict. The legislature provides a forum in which these interests "can be controlled by balancing and stalemating." H. PITKIN, *supra* note 43, at 195. Thus, it is the nature of the institution, rather than the bona fides of the personnel who occupy it, that ensures action motivated by public interest. Her reading of Madisonian legislatures purports to solve the riddle of why we should place substantial faith in representatives when those who elect them are distrusted. Her view is more consistent with the model of legislative action

Defense of representative government, therefore, must rest on benefits inherent in the process of *serving* as a representative. Lawrence Sager has captured the underlying sentiment for the comparative benefits of legislators by focusing on their capacity to engage in "a reflective determination that the action contemplated is fair [and] reasonable."⁵¹ On this view, it is the unique domain of the legislature to deliberate over issues. Plebiscites merely aggregate;⁵² "there is no genuine debate or discussion, no individual record or accountability, no occasion for individual commitment to a consistent or fair course of conduct."⁵³ Plebiscites occur in staccato fashion on isolated and unrelated topics. The myriad issues on which the voters express themselves have only coincidental interconnection and provide voters with little means to formulate a unified idea of appropriate government action.⁵⁴ In this conception, legislators, but not voters, consider the reasons for voting in a certain way; engage others in discussion to refine their opinions; are moderated by the public exposure of their votes; devise cohesive theories of government; and consequently render judgments that have the flavor of public interest.

That legislation transcends narrow self-interest, however, does not necessarily imply that legislators engage in something akin to a Rawlsian state of deep reflective equilibrium. Rather, more mundane mechanisms promote enactments that satisfy Sager's desire for fairness and reasonableness and discourage conduct that deviates substantially from the socially beneficial. These checks take the forms of internal processes and external filters. Proposals for legislation are subject to a series of internal checks that have the effect (if not the purpose) of frustrating self-interested enactments. While there are few constraints on the introduction of proposed legislation, committee hearings and other mechanisms for derailment ensure that most proposals never achieve the status of law. Bicameralism creates additional obstacles that must be traversed before legislation can be enacted, discouraging

that I discuss in the next section of this article. For the moment, I am willing to accept the principle, evident elsewhere in Madison, that representatives not only balance, but also transcend, self-interest.

51. Sager, *supra* note 28, at 1414. Professor Sager's particular concern is with legislation that is at odds with constitutional mandates. Thus, the above quotation is followed by the phrase "and not at odds with specific prohibitions in the Constitution." *Id.* But nothing in his analysis of plebiscites suggests that he would analyze the propriety of direct democracy differently with respect to legislation that clearly fell within constitutional boundaries. At the risk of reading Sager too broadly, I will assume that his critique applies equally to nonconstitutional cases.

52. See, e.g., Kateb, *supra* note 26, at 371 ("Representation is not there to provide openings for social and economic inequality to turn into political inequality: the politics of direct democracy is pure numbers.").

53. Sager, *supra* note 28, at 1414-15.

54. See Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 227-28 (1976).

propositions that lack broad support. While the check of bicameralism finds less acceptance at the local level, even there individual legislators can accomplish little on their own. Without coalitions or alliances, the single legislator will be unable to translate self-interest into law. This need for cooperative effort has several effects. Support is unlikely to be forthcoming unless the measure at issue has broad appeal. Proposals that deviate substantially from the public interest are likely to fail or at least to be diluted as a compromise, necessary to capture majority support, is struck. Logrolling ensures that compromise will dilute the most extreme versions of proposals. The requirement of public voting and public explanation restricts the capacity of legislators to vote either their own dark urges or those of their constituents. Even if legislators represent a biased constituency, the argument suggests, the requirements of public explanation will inhibit the expression of these sentiments and will induce votes that transcend narrow interests. Finally, the courts serve as an external constraint on legislators.⁵⁵

The issue, then, is not deliberativeness alone. Instead, deliberation is only one mechanism (albeit a very effective one) for deterring self-interested legislation.⁵⁶ But if that is the case, then deliberation, while sufficient to induce socially optimal decisions, is not necessary. Thus, even if we could not guarantee an equivalent level of deliberation in the plebiscite, it is by no means clear that alternative mechanisms more readily available to participatory processes could not fill the void and provide similar, if not superior, assurances.

B. *Theories of Voting and Their Limits*

The search for a functional equivalent of legislative deliberation may begin with easy answers, if only to indicate their chimerical nature. One response to raw majoritarianism is to contend that plebiscites at the local level have little effect on societal welfare because those adversely affected can move to more congenial localities, the availability of which also underlies de Tocqueville's esteem for decentralized administration. On this conception, exit from a locality that

55. See Macey, *supra* note 10.

56. Of course, deliberation may be useful in its own right. Just as public participation is considered to be an educative process for participants, so may legislators grow and develop through their own deliberations. Thus, deliberation is to be encouraged. But those who favor legislative over plebiscitary processes do not value deliberation because of its effect on individual legislators. Rather, their concern is with the instrumental effects of deliberation, *i.e.*, its capacity to deter narrowly interested legislation. To the extent that other checks in the lawmaking process produce the same result, there is little reason for the pure instrumentalist to favor one over the other.

has acted invidiously is largely salutary, as it informs the original municipality that its policies require reform.⁵⁷ The problem with this response is not simply the obvious objection that some people do not have the resources to vote with their feet. (Indeed, I shall argue in the next section that the inability to leave is a catalyst for conduct — voice or complaint — with an aura of public interest.⁵⁸) Rather, the related, though subtly different point that undercuts this argument is that municipalities do not provide a single good, the dilution or absence of which would generate substantial discontent. Instead, municipalities provide packages of goods or services, the total of which attracts potential residents.⁵⁹ Thus, even those who object to a plebiscite that alters a particular service are unlikely to exercise an exit option (or even a voice option) as long as there remains some net benefit from other local services that exceeds the benefit obtainable elsewhere.

The need for deliberation or some equivalent, then, appears to be essential to the plebiscite's credibility as a mechanism for political decisionmaking. Certainly there is nothing that precludes voters from deliberation about the issues before them. The critics of plebiscites appear only to contend that voters will not take advantage of their opportunities for thoughtful discussion. Mill, on the other hand, believed that *only* the ballot could generate sufficient popular interest in political matters to induce participation in "political discussion, and collective political action."⁶⁰ This view seems overly optimistic about

57. See A. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 21-29 (1970). Departure from the locality would constitute selection of the exit option. Those who remain may still work for political reform, thereby exercising the voice option. The availability of exit also ensures a wide array of choice for residents by making available municipalities with different characteristics. Thus individuals can migrate to the locality whose services best reflect individual preferences. The classic work suggesting that exit could produce an optimal allocation of municipal services (though employing a different jargon) is Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). For a discussion of adverse effects that may be generated by emigration (e.g., reduction of subsidies for those who remain), see Buchanan & Goetz, *Efficiency Limits of Fiscal Mobility: An Assessment of the Tiebout Model*, 1 J. PUB. ECON. 25 (1972).

58. See text at notes 155-59 *infra*.

59. See Gillette, *Equality and Variety in the Delivery of Municipal Services* (Book Review), 100 HARV. L. REV. 946 (1987) (municipalities' function as providers of a package of services renders difficult the argument that municipalities are obligated to provide equal service to all residents).

60. J.S. MILL, *supra* note 45, at 211. Mill elaborated:

It is by political discussion that the manual labourer, whose employment is a routine, and whose way of life brings him in contact with no variety of impressions, circumstances, or ideas, is taught that remote causes, and events which take place far off, have a most sensible effect even on his personal interests; and it is from political discussion, and collective political action, that one whose daily occupations concentrate his interests in a small circle round himself, learns to feel for and with his fellow-citizens, and becomes consciously a member of a great community. But political discussions fly over the heads of those who have no votes, and are not endeavouring to acquire them.

Id.

the effects of the ballot in at least two respects. It is by no means clear that those without a vote would be disinterested in the outcome of public affairs that otherwise affect their lives.⁶¹ Indeed, the very absence of the vote might lead such individuals to engage in increased political action as their only recourse for influencing political decisions. Perhaps more importantly, however, both Mill's testimonial to the benefits of voting and the conflicting claims of raw majoritarianism fail to consider the empirical observation that large numbers of those who hold the franchise fail to exercise it, especially on matters submitted to plebiscitary approval.

Voter apathy is typically explained by reference to self-interest, *i.e.*, the personal costs of voting exceed personal benefits.⁶² That same explanation, however, complicates explanations of the existence of substantial numbers of voters on any given issue. For if potential voters are, indeed, narrowly self-interested, it would appear that they would avoid the voting booth altogether. Individuals motivated by self-interest will vote only if that act produces benefits greater than those they could accrue through an alternative use of the same resources, *e.g.*, time, effort, and financial outlays incurred in going to the voting booth. Particularly for those in the majority, voting is unlikely to produce individual benefits in excess of costs (including opportunity costs). Even if social benefits of voting exceed the aggregate of individual costs expended in the process, the unlikelihood that the marginal voter will make a difference to the outcome suggests that rational, narrowly self-interested individuals could abstain and ride freely on the efforts of others.⁶³ This, of course, is a manifestation of the well-known collective action problem that materializes whenever an actor creates positive spillover effects from which the beneficiaries cannot be excluded. One would think that the incentive to abstain felt by a potential voter perceiving herself to be in the majority would be even more significant, because the advantage she can gain by voting her preferences is even less than what a member of the minority might obtain. It is for this reason that we often hear candidates with large

61. For instance, at the time when eighteen-year-olds had no right to vote but an obligation to serve in the armed forces, few could reasonably contend that males in that age group were disinterested in political decisions to introduce the military into combat.

62. See, *e.g.*, A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 260-74 (1957); F. FROHOCK, *supra* note 18, at 76.

63. Where elections are close, so that voters get positive utility from voting because it might affect outcomes, voters are more likely to engage in deliberative processes and thereby bring participatory processes closer to the deliberative ideal of the representative process. See D. MUELLER, *PUBLIC CHOICE* 122 (1979) (discussing literature that suggests voter participation is positively correlated to closeness of election). I consider cases of "close" elections to be aberrational for purposes of this article, and thus place my argument for plebiscites on other grounds.

leads in pre-election polls urging their followers not to take victory for granted on election day. The assumption underlying these exhortations may evolve from something like a theory of the diminishing marginal utility of voting: a vote is worth more to the voter who believes his views coincide with those of a minority than to the voter who believes his views coincide with those of a majority.⁶⁴ If this is correct, then the question that we inevitably hear after elections — “Why so few voters?” — might properly be recast: “Why so many?” While these responses suggest that Mill was overly optimistic about the educative effects of voting, the presence of voters may also be a source of belief in the vitality of deliberative voting in the plebiscite. If the existence of substantial voting can be explained by preferences for activities that foster deliberative or other forms of checks on self-interest, then plebiscitary practices may be less objectionable than the argument from raw majoritarianism suggests. It is to the possibility of such an explanation that I want to turn. First, however, it is necessary to eliminate alternative explanations for voting.

Traditional explanations for collective action in the face of free riding opportunities cannot similarly account for the phenomenon of voting. For instance, a substantial amount of collective action is explained by the use of individualized and excludable by-products that accompany (and thus induce) participation in the collective (e.g., a magazine that is sent to dues-paying members).⁶⁵ These by-products may raise the individual benefits of collective action sufficiently to justify the commensurate cost. In the voting arena, however, the use of by-products to induce participation is largely precluded by laws against vote selling. Even those who gather mementos of political support — bumper stickers, pins, and funny hats — may do so without actually voting for the candidate whom they support.

Alternatively, collective action problems are often overcome by the presence of an entrepreneur who seeks personal gain from action that confers collective benefits on others.⁶⁶ This opportunity, however, is similarly unavailable to individual voters, who are the recipients, rather than the creators, of public goods that materialize through en-

64. See W. RIKER & P. ORDESHOOK, *INTRODUCTION TO POSITIVE POLITICAL THEORY* 57 (1973); Meehl, *The Selfish Voter Paradox and the Thrown-Away Vote Argument*, 71 *AM. POL. SCI. REV.* 11 (1977). The diminution in valuation may occur only after the voter believes that a fifty percent threshold has been exceeded.

65. See, e.g., R. HARDIN, *supra* note 20, at 31-35; see also Barry, *Political Participation as Rational Action*, in *RATIONAL MAN AND IRRATIONAL SOCIETY* 53, 61-64 (B. Barry & R. Hardin eds. 1982).

66. See R. HARDIN, *supra* note 20, at 35-37; N. FROHLICH, J. OPPENHEIMER & O. YOUNG, *supra* note 37, at 7-8.

trepreneurship. Finally, there may be a discrete subgroup whose members would receive sufficient benefits from a particular action that it is worth their while to incur all the costs of the action, although noncontributors would also benefit.⁶⁷ In such a case, only envy or spite would prevent self-interested actors from pursuing a course of action.⁶⁸ Once again, however, the voting arena provides little opportunity for the interested subgroup. Even the individual who will obtain the greatest benefit from an electoral vote, the politician who wins an election as representative, has only a single vote. Even at the local level, it is unlikely that the "spoils" available to a successful candidate will be sufficient to explain a substantial percentage of votes cast. Thus, the presence of individuals who would benefit personally from the public good of voting fails to explain the phenomenon of mass voting that places the successful candidate in office in the first instance.

Others have attempted to explain voting by relaxing the assumption that individual voters are motivated by self-interest. These explanations vary in their persuasiveness. One possibility is that individuals make ideological decisions to vote. Much of our political culture is directed at creating a duty to participate through the act of voting, even though personal costs may otherwise exceed personal benefits.⁶⁹ We are told, for instance, that we have no grounds for complaint about government policies if we failed to take advantage of opportunities to alter those policies, even though an additional vote would be most unlikely, even at the local level, to have affected the substance of those decisions. But appeals to duty fail readily to separate those who vote from those who do not. There is, for instance, no sense that those who vote otherwise fulfill socially imposed duties (to family, country, or neighbors) and that those who do not vote ignore those duties.

Utilitarian or consequentialist explanations of voting are also unsatisfying. Derek Parfit, for instance, suggests that voting for a superior candidate is usually a rational act for the consequentialist because the expected value of even a single voter's contribution is positive.⁷⁰ Similarly, Brian Barry argues that a utilitarian would participate

67. See M. TAYLOR, *THE POSSIBILITY OF COOPERATION* 10 (1987); R. HARDIN, *supra* note 20, at 40-42.

68. This is not to minimize the effects of spite, which may indeed prevent actors from engaging in conduct that would return net personal benefits. See Leff, *Injury, Ignorance, and Spite — The Dynamics of Coercive Collection*, 80 YALE L.J. 1 (1970).

69. See A. DOWNS, *supra* note 62, at 267-68; Ashenfelter & Kelley, Jr., *Determinants of Participation in Presidential Elections*, 18 J.L. & ECON. 695, 724 (1975); Barry, *supra* note 65, at 60.

70. See D. PARFIT, *REASONS AND PERSONS* 73-75 (1985).

(vote) whenever individual net marginal benefits were positive, which must be the case when social net marginal benefits are positive. Otherwise, one would be confronted with the anomaly that the sum of net negative individual contributions would be a social positive. In order to avoid the anomaly it must be individually worthwhile to contribute whenever the contribution is worthwhile to society.⁷¹

The consequentialist arguments, however, are less compelling than they appear at first glance. Even if Parfit is correct that the expected value of a vote is positive, its absolute value may be insignificant. The individual voter, therefore, may be able to bring about a greater expected value by making an equivalent investment in some activity other than voting. Assume, for instance, that the cost of voting to a utilitarian was $\$X$ and that the expected net value of the vote (expected value less $\$X$) was $\$5$. That would be the case, for instance if there were one chance in a million that the utilitarian's vote for a superior candidate would make the difference between that candidate winning or losing the election, and, if the superior candidate were to win, society would be better off (after deducting the costs of voting) by $\$5$ million. The utilitarian still would not vote if $\$X$ could be invested in some activity that would return a net value of greater than $\$5$ (including the costs of searching for the alternative activity). Perhaps the utilitarian would confer greater social rewards by donating $\$X$ to Oxfam or a local charity. Given the low probability of affecting elections (Parfit puts the probability of an individual's affecting the outcome of a presidential election at one in 100 million⁷²), it is not difficult to believe that alternative uses of the same money would return greater expected benefit values.

Barry's utilitarian argument similarly suffers from omitting the effects of alternative courses of conduct. Again, he suggests that a utilitarian should vote if the social effects are positive, because personal effects necessarily contribute to the social benefit: "[I]f a hundred-thousand members count for something, then each one contributes on the average a hundred thousandth."⁷³ If it is socially desirable that elections be held, then it must be socially desirable for each eligible voter to vote.

Presumably, what makes voting desirable in this sense is that one candidate is superior. Thus, if a superior candidate attains 1000 votes and an inferior candidate receives 999, each voter in the majority has

71. Barry, *supra* note 65, at 61.

72. D. PARFIT, *supra* note 70, at 74.

73. Barry, *supra* note 65, at 61.

contributed one-one thousandth to the greater good. On this view, a utilitarian should vote for the superior candidate. But what if the superior candidate attains 1001 votes and the inferior 999? What then has been the contribution of the new voter? Is the voter responsible for 1/1001 of the benefits? Arguably not, as those same benefits would have materialized had the last voter not voted at all. In short, the marginal benefit of that voter's participation is zero, even though the contributory consequences of the participation are positive.⁷⁴ Donald Regan's argument that the contributory consequences approach to utilitarianism leads to highly counterintuitive results⁷⁵ seems particularly applicable here. If the social consequences that the utilitarian desires will be advanced even without his participation, it seems unclear why he would be driven to contribute to that result. Indeed, given that the same result would obtain without his participation, it seems likely that the utilitarian could produce superior total consequences by dedicating his resources to endeavors other than voting that would benefit society.

Correcting the omissions in Parfit's and Barry's analyses leaves the conclusion that voting becomes rational only if the subjective⁷⁶ expected utility of one's vote (the perceived probability that one's vote will be decisive multiplied by the social benefit that will materialize should that vote be decisive) exceeds the subjective expected return (opportunity costs) of not voting.⁷⁷ Barry's focus solely on the pro rata distribution of ex post responsibility for the outcome ignores both this comparison and the fact that casting the decisive vote is highly improbable. That improbability means that the expected utility of one's vote is likely to be minute; *i.e.*, it is likely to be exceeded by the subjective expected return of not voting.

More advanced theories of participation attempt to solve the paradox through sophisticated models that expand the definition of the benefits of participation. On this view, participation is not simply a means to an end, a device for accomplishing a particular political objective. Were participation solely a means, participants would be incurring personal costs that could be avoided with no loss of personal welfare so long as sufficient others continued to pursue the same objective. If participation is simply a means, in short, it constitutes a pure

74. Singer, *Is Act-Utilitarianism Self-Defeating?*, 81 PHIL. REV. 94, 103 (1972).

75. D. REGAN, UTILITARIANISM AND CO-OPERATION 14-15 (1980).

76. I use subjective expected utility here because the issue is whether a person believes it rational for her to vote, not whether it is objectively rational to take that action.

77. See D. REGAN, *supra* note 75, at 231. Regan's analysis makes clear that subjective expected utility takes into account the anticipated conduct of others.

cost item. But if participation produces its own benefits, then the calculus underlying the self-interested decision to participate or abstain is significantly altered. Participation becomes not a production good, but a consumption good⁷⁸ that returns its own benefits. Participation becomes a worthwhile endeavor wholly apart from any benefits the voter might receive from the particular result of the political enterprise, e.g., an election. Voting, for example, permits the actor to view himself and to be viewed by others as a participant in the political process. It allows one to share in the pleasures of a particular victory or commiserate with others over a defeat.⁷⁹ The dramatic effect that this conception has on the decision to participate is reflected in Hirschman's argument that the benefit of political participation to an individual is "not the difference between the hoped-for result and the effort furnished by him or her, but the *sum* of these two magnitudes."⁸⁰

Although they might assiduously avoid economic terminology, many of those who favor increased participation would quickly embrace the notion that participation produces benefits to the participant. The argument finds its most sympathetic and controversial voice in the philosophy of Hannah Arendt, who viewed public participation (a term involving, for her, far more than the trivial act of voting) as the highest end of life. Indeed, public life was the appropriate response to the anguish of life's burdens: "[I]t was the polis, the space of men's

78. See J. KRIER & E. URSIN, POLLUTION AND POLICY 270-71 (1977).

79. It has been suggested that consumption benefits are low because most voters, given the choice, would prefer to mail ballots than to wait in line at the polling place. See H. MARGOLIS, SELFISHNESS, ALTRUISM AND RATIONALITY 86 (1982). But as I indicate above, some of the consumption benefits may be as obtainable through the former mechanism as through the latter, so that presence at the polling place is not an essential feature of obtaining a net personal benefit through the participatory process. Further, Margolis's point raises, but does not answer, an interesting empirical inquiry. It may be that being seen at the polling booth does return substantial personal benefits (e.g., allowing one to be perceived by others as a public-spirited citizen) and thus reflects the presence of substantial consumption benefits.

80. A. HIRSCHMAN, *supra* note 23, at 86 (emphasis in original). For a critique of the view of participation as consumption, see J. ELSTER, *supra* note 9; Elster, *Rationality, Morality, and Collective Action*, 96 ETHICS 136, 147 (1985). A response to Elster may be found in Hubin, *Of Bindings and By-Products: Elster on Rationality*, 15 PHIL. & PUB. AFF. 82, 94-95 (1986). Elster's argument seems to be that the benefits of participation are necessarily by-products that can arise only as a result of undertaking some independent goal, such as the need to make a decision. See J. ELSTER, *supra* note 9, at 98. I am somewhat puzzled at the notion that one cannot decide to participate in a political activity for no reason other than to improve oneself and successfully emerge from the activity with an improved political acumen. What may be important to an individual is not simply the passage or rejection of a political proposal, but the fact that the individual played a role in attempting to bring about a specific result. Thus, one may find participation exhilarating, even if one is involved in the losing side of the enterprise. Of course, exhilaration is not necessarily a good, particularly if it arises simply from participation in a mass enterprise, i.e., conformity for its own sake. But saying that participation may generate suboptimal results is very different from saying that participation can only be viewed as a means for generating results of which personal benefits are a by-product.

free deeds and living words, which could endow life with splendor."⁸¹ Moreover, it was only at the local level that the mass of individuals could fully participate and realize their potential. The representative democracy that would be necessary at the national level permits only the expression of individuals' interests or welfare; it provides no method for consideration of "opinion," formed through active participation of those represented.⁸² This rationale led Arendt to bemoan the absence in our constitutional structure of a place where the people could exercise the activities of freedom: "expressing, discussing, and deciding."⁸³ While the Constitution had empowered citizens against the state, it failed to ensure a place for them in the public realm of discussion and decisionmaking. Yet "public freedom" was the prerequisite of human freedom. The need for a public realm conjoined with its impracticality at the levels to which the Constitution spoke required localities to seize the role of true republics in which individuals could act as citizens.

But even if we accept the argument that participation returns net benefits to participants, the mere act of voting would appear a poor mechanism for increasing the welfare of individual voters. The consumption theory has been utilized most frequently to explain active participation in attempts to influence government policy: lobbying, demonstrating, drafting of legislation.⁸⁴ *Relatively* costless public ac-

81. H. ARENDT, *supra* note 5, at 285. For the most thorough (but not wholly sympathetic) analysis of Arendt's views on political action, see G. KATEB, *HANNAH ARENDT: POLITICS, CONSCIENCE, EVIL* (1983). Kateb characterizes Arendt's position on participation as one that renders particular outcomes secondary:

It is participating directly in decisions of the highest importance, of the greatest indefiniteness, that matters; not because one's autonomy is injured without such participation, but because one does not achieve full humanity except as an equal partner in the group whose decisions shape the common life. If one participates directly, it makes little difference whether one is in the majority or minority.

Id. at 41; see also Benhabib, *Judgment and the Moral Foundations of Politics in Arendt's Thought*, 16 *POL. THEORY* 29, 44-48 (1988).

82. H. ARENDT, *supra* note 5, at 272-73. For Arendt, "[i]nterest and opinion are entirely different political phenomena. Politically, interests are relevant only as group interests Opinions, on the contrary, never belong to groups but exclusively to individuals Opinions will rise wherever men communicate freely with one another and have the right to make their views public" *Id.* at 229.

Kateb concludes that, for Arendt, "[t]he creation of representative institutions is the death of unprofessionalized, unpartisan grass-roots participation in discussions of the highest importance." See G. KATEB, *supra* note 81, at 19. This is not to suggest that Arendt endorsed plebiscites. See text at note 85 *infra*.

83. H. ARENDT, *supra* note 5, at 238 (paraphrasing Thomas Jefferson's letter to Samuel Kercheval (July 12, 1816)). To Arendt, this political place could occur only at the local level. Hence, her endorsement of Jefferson's call to "divide the counties into wards." *Id.* at 252 (quoting Jefferson's letter to John Cartwright (June 5, 1824)); see also note 7 *supra*.

84. See, e.g., J. KRIER & E. URSIN, *supra* note 78 (using consumption theory to explain why citizens became involved in efforts to control air pollution in California); A. HIRSCHMAN, *supra* note 23.

tivities such as voting would seem to return fewer consumption benefits, particularly if we accept Albert Hirschman's formulation that the benefit derived from participation equals the sum of expected result and effort. It is presumably for this reason that Arendt viewed plebiscites as a process that "puts an end to the citizen's right to vote, to choose and to control their government."⁸⁵ Thus, if our primary concern is determining why constituents get into the voting booth, some additional explanation must be necessary.

Alternatively, Hirschman has sought to explain political activity (including voting) as an expression of disappointment with the private features of our lives.⁸⁶ Hirschman sees participation in public life as a reaction to the frustrations of private consumption and to a desire for radical change. Voting, then, becomes a mechanism for complaint, even if the expected efficacy is limited. Voting as complaint becomes a consumption good not in Arendt's sense of political participation as the highest human activity, but, more earthily, as a means for getting our concerns off our individual and collective chests. But if voting becomes an expression of protest, it makes sense only where other forms of protest, e.g., emigrating to a more congenial environment, are relatively costly. Thus, voting fits Hirschman's paradigm of "voice," likely to be utilized to express concern about a deteriorating situation where "exit" from the situation would entail substantial costs.⁸⁷ But this theory, too, does little to explain substantial voting. Complaining voices may speak with greater frequency and at less cost through alternatives to voting, e.g., by writing letters or making telephone calls to elected officials or to newspapers. Thus, the occasional exercise of voting seems to provide little outlet for public complaint.

C. *Beyond the Voting Booth: Deliberative Voting*

There do exist, then, a variety of arguments that do not rely on altruism to explain the phenomenon of substantial voting.⁸⁸ In isola-

85. H. ARENDT, *supra* note 5, at 231.

86. See A. HIRSCHMAN, *supra* note 23, at 9-24.

87. *Id.* at 92-98.

88. Again, I am attempting to discern nonaltruistic motives for voting in order to avoid a tautological conclusion that those who vote will consider the interests of others in determining how to vote. Clearly, if people are willing to expend resources to increase not only their own welfare, but also the welfare of others, then voting might be one means of effecting the desired result. See H. MARGOLIS, *supra* note 79; Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 UCLA L. REV. 1309, 1341-42 (1986). Indeed, even if voting consists of little more than a desire to register a preference, to the extent that that desire is motivated by a sense of duty or commitment to a joint enterprise, it may represent activity triggered by concern for others rather than oneself. See Barry, *supra* note 65, at 60; A. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 195 (1970); Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317, 323-33 (1977).

tion, the more convincing among these arguments fail to refute the claim that raw majoritarianism is a substantial threat in plebiscitary processes. For if individuals have substantial incentives to vote that do not emanate from concern for the welfare of others, they likely will turn out to record their narrowly self-interested preferences. If that is the case, minorities are vulnerable to repressive measures proposed through the plebiscitary process. Indeed, if voting is more likely among those who obtain personal benefits from the act, bigots with strong preferences are more likely to register their preferences than more open-minded citizens with a lower intensity of conviction.

This concern, however, assumes that the reasons voters enter the voting booth have no effect on the policies for which they ultimately vote.⁸⁹ The concern dissipates if inducements to vote are less neutral, if the motivations that lure voters to the voting booth simultaneously and systematically induce other-regarding behavior.⁹⁰ The act of voting ought not to be looked at in isolation, if in fact it is simply part of, indeed merely the denouement of, a participatory process. If that process includes elements that routinely create checks on self-interested legislation and incentives for deliberation analogous to the checks and incentives imposed on publicly interested legislators, then perhaps widespread voting would not be indicative of raw majoritarianism; on the contrary, it would suggest that plebiscitary decisions shared the societal perspective assumed to arise from a deliberative legislative process. Presumably, this would result because the motivations to vote at all simultaneously induced either deliberation among voters or some functional equivalent that similarly deterred narrowly self-interested conduct.

Before analyzing these possibilities, I want to address the literature that suggests the absence of a correlation between the desire to vote and the manner in which the vote is exercised, for these arguments implicitly deny that voters deliberate in any meaningful way about their electoral choices: Amartya Sen, for instance, has suggested that an individual might simply enjoy voting but be indifferent as to alternatives for which his vote may be cast. Gratification may be obtained through participation in the decisionmaking process, on this view,

89. For an argument that the decision *whether* to vote is influenced by factors that vary from those affecting the decision *how* to vote, see Brennan & Buchanan, *Voter Choice: Evaluating Political Alternatives*, 28 AM. BEHAVIORAL SCIENTIST 185 (1984); Buchanan, *Individual Choice in Voting and the Market*, 62 J. POL. ECON. 334 (1954).

90. Margolis reaches a similar conclusion: "[O]nce the conventional [cost-benefit] analysis leads us to the result that voting must ordinarily depend heavily on psychic income, then it becomes arbitrary to assume that this psychic income comes only from the act of voting and not at all from how [the voter] votes." H. MARGOLIS, *supra* note 79, at 87.

wholly apart from the benefits gained or lost as a result of a particular decision. This "indifferent voter" might overcome the disincentives to vote, but not deliberate about which way to vote once that decision is made. This voter would obtain as much satisfaction from voting based on a coin toss as from voting based on contemplation of possible outcomes.⁹¹ This account of voting, however, fails to explain the source of the indifferent voter's delight. If it emerges from a perverse pleasure in pulling small levers, or from being seen in public places, Sen would be correct. Yet each of these objectives could be satisfied at a relatively low cost without undertaking the burdens of voting. In the absence of more compelling explanations, we are forced back to the initial inquiry into whether obtaining that delight requires more reflective analysis than Sen's model suggests.

Geoffrey Brennan and James Buchanan similarly contend that even if voters have preferences, there is no reason to presume that their "choice in the polling booth reflects or corresponds with . . . preference[s] over outcomes."⁹² They argue that because individual voters recognize that their effect on outcomes is likely to be nil, they are less likely to vote true preferences. Brennan and Buchanan assert that unlike market situations, in which individuals are likely to vote true preferences because failure to do so means those preferences will be forgone (an inaccurate premise, at least in the case of public goods), the opportunity cost of pulling a particular lever is "not a particular policy forgone, but simply the other lever or levers unpulled."⁹³ To these authors, voters are analogous to sports fans who are primarily interested in watching a sports event and have little interest in the outcome, other than to "adopt" a team for the afternoon, taking on a partisan stance as a means of stimulating interest."⁹⁴

There are a variety of responses to this argument. The first is a reversion to the comparative claim. Even at the local level, the vote of any one representative is unlikely to make a difference. Further, since public debate and deliberation among representatives prior to voting is common, each representative is likely to know prior to voting that his or her vote is irrelevant to the outcome. Thus, if inability to affect outcomes means members of the electorate are unlikely to reflect their true preferences among outcomes, there is similar reason to believe that these same motivations exist — at least on some occasions — with respect to representatives. Representatives may cast votes contrary to

91. See A. SEN, *supra* note 88, at 195-96.

92. Brennan & Buchanan, *supra* note 89, at 194.

93. *Id.*

94. *Id.* at 186.

their preferences because they are relatively unconcerned about the issue at hand and wish to exchange their vote with another representative on an issue of greater personal import.⁹⁵

But there is a more fundamental difficulty with Brennan and Buchanan's argument. If a voter has a preference for a certain outcome, once the voter determines on some independent basis to vote at all, it is unclear why he or she would not vote that preference even if he or she believes the vote will have no impact on the outcome. A contrary vote presumably also would have no impact on the outcome. Yet — given the decision to vote at all — there is some motivation to vote one's preferences, however slight, and little motivation to vote for the contrary. Indeed, Sen has suggested that voting may be explained simply by a drive to express one's preferences.⁹⁶ Perhaps some motivation to vote in a manner inconsistent with preferences over outcomes could exist; Brennan and Buchanan, however, simply do not explain what that motivation might be. I can imagine that a voter might wish to vote for a candidate even though the voter does not favor that candidate's position, if only to send a message of dissatisfaction with alternative choices (e.g., voting for a third-party candidate). But even here, the voter is acting in accordance with personal preference — to make a Grand Gesture. In the absence of some more compelling explanation, it would appear reasonable to assume that people vote in accordance with their preferences over outcomes. That being the case, it once again becomes crucial to determine whether, in the development of those preferences, voters engage in a process functionally equivalent to legislative deliberation.

I want to be quite clear as to the scope of this claim. I am not suggesting that all voters act in an other-regarding manner when they step into the voting booth. The existence of self-interested plebiscites and their occasional success is sufficient to debunk that proposition. My assumption is that self-interest continues to motivate voters, but that self-interest in local plebiscitary contexts can generate cooperative solutions. Additionally, my claim is comparative. Neither all voters nor all legislators are likely to act in a manner that coincides with societal interest. The assumption that representative democracy provides a superior check on divergence from the optimal depends in large part on the assumption that representative bodies alone are sufficiently deliberative to temper self-interest. My claim is simply that

95. If we relax the assumption that representatives always act in the public interest, this exchange process might facilitate nonpublic interest legislation, since there would presumably be less of a need to trade for votes that truly reflect public interest.

96. A. SEN, *supra* note 88, at 195.

similar or alternative mechanisms for neutralizing socially suboptimal effects of self-interested behavior may be found in certain identifiable participatory procedures.

Analysis of the decision to vote at all suggests some reasons for believing that decisions about how to vote involve considerations that permit voters to coordinate or to overcome selfish desires. Perhaps the easiest case for assuming a relationship between the decisions whether to vote and how to vote emerges from the altruism explanation for the former. If altruism solves the voter's paradox, a presumption of deliberation by the voter appears appropriate. Any different presumption would require the incongruous belief that a voter considered the act of voting necessary to satisfy obligations towards others in the society, but that how one voted was irrelevant to that same task. Assuming that voters are at all motivated by altruism, it seems a short step to conclude that altruistic motives dictate how they vote. Similarly, if voting is explained by a sense of duty, obligation, or beneficence towards others, deliberativeness appears to be an integral part of the voting process. It would be anomalous for a potential voter to proclaim that he had an obligation to vote, but no similar obligation to consider how to vote. Since I have assumed self-interested voters, however, I do not want to rest my case on the possibility of voters motivated by altruism or a sense of duty.

Incorporating other-regarding behavior into alternative explanations for voting, however, proves more problematic. In particular, the implications of the consumption benefits explanation are quite ambiguous. Those benefits, as suggested above,⁹⁷ are likely to be small since they presumably correlate to effort expended, and there is little effort attached to the act of voting. Thus, substantially more benefits will accrue to those political participants who take an active role in campaigning for a position than to those who merely register preferences in a voting booth. Initially, then, this explanation appears to strengthen the possibility that voters vote deliberatively. The likelihood of receiving additional consumption benefits may lead individual voters into a variety of forms of political action. These include both minor, passive steps such as listening to debates⁹⁸ and active steps such as endorsement of a favored position, leafletting, and organizational or lobbying activity. Indeed, it may be that the more one engages in political activity, the more "addictive" the benefits become, so

97. See text at notes 76-84 *supra*.

98. My sense that an important element of participation consists of passive conduct is informed by Leo Strauss's remark that "liberal education consists in listening to the conversation among the greatest minds." L. STRAUSS, *LIBERALISM ANCIENT AND MODERN* 7 (1968).

that discussion begets further discussion.⁹⁹

The remarkable feature of these activities is that they increasingly demand the kind of conversation, advocacy, and analysis that we attribute to legislative deliberation. Voting, on this view, is not the citizen's distinctive act of political participation, but the culmination of a variety of other activities. It is, in fact, anticlimactic. Those who enter the voting booth are not necessarily blind to the arguments against the position that they prefer. Rather, they have rejected those arguments after consideration — consideration in which private interest would be tempered by discussion in the public realm.¹⁰⁰ This is not to say either that they have rejected the arguments on principled grounds, or that those who have deliberated would agree on a result. It is only to say that the deliberative process that informs legislators has an equivalent in the plebiscitary process, and that the process of voting (whether perceived as a cost or benefit) serves as a filter for those who have thought about the underlying issues. Participation in this deliberative process possesses an evolutionary quality for those involved. Political argument confronts participants with competing views, generates new information, demonstrates the irrationality of initial preferences, and broadens the basis on which to make ultimate decisions at the polls. As in the ideal legislature, participatory decisionmaking “does not consist in totaling up previously formed intentions or wills,”¹⁰¹ but in the competition in which positions are attacked and defended.¹⁰² The vote serves solely as a tabulation of wills as formed at a particular point in this interactive process,¹⁰³ but is wholly consistent with a perception that the process has been a deliberative one.

Yet there is a darker side to the consumption benefits explanation of voting. If self-interest motivates the selection of benefits for consumption, it may be that those who have the narrowest self-interest at heart, who are at the fringe, or whose “dark urges” are most fanatic

99. See A. HIRSCHMAN, *supra* note 23, at 96-102.

100. Or at least, this was Arendt's view. She considered one danger of the public/private distinction to lie in the possibility that checks on public power and protection of private property could, in a period of economic expansion, produce unchecked private power in the hands of those who had not been given the opportunity “of *being* republicans and of *acting* as citizens.” See H. ARENDT, *supra* note 5, at 256 (emphasis in original).

101. Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338, 355 (1987).

102. *Id.* at 352. For Manin, it is the opportunity to participate in this interactive process, rather than the majoritarian outcome, that gives political decisions their legitimacy. As long as losers have had an opportunity to participate and attempt to convince others, they are bound to accept the legitimacy of the result.

103. Manin suggests that the vote tabulates wills at the “end” of the process, *id.* at 359, but there is no reason to believe that deliberation and preference shifting cannot continue even after a particular vote on an issue.

are the persons for whom voting is the currency of choice. Indeed, if those outside the mainstream stand the most to gain by their individual votes, there is reason to believe that they will be overrepresented in the final tally. For these individuals, the capacity to free ride poses less of a disincentive to vote for two reasons. First, the group's low numbers mean that the marginal utility of each member's vote is substantially higher than that of a member of the majority. Second, fanaticism suggests that these individuals' preferences are intense, so that the personal costs of voting are more readily outweighed by personal benefits of expressing their positions. For instance, there is evidence that, despite professionals' conclusions that fluoridation returns substantial net benefits, and is generally approved without altercation in city councils, referendum proposals for fluoridation have failed surprisingly often. In Massachusetts, for example, the pass rate of fluoridation referenda has been only about fifty percent.¹⁰⁴ The dramatically greater proportion of defeats in referenda is attributed to successful intervention by "fringe organizations which, over the years, have linked fluoridated water to such diverse phenomena as cancer, communism and AIDS."¹⁰⁵ In short, we have here an application of the moral monster problem that poses difficulty for utilitarian schemes generally: how to exclude from a calculus the preferences of the wildly irrational.

The consumption benefits explanation of voting, therefore, does not unequivocally support an expanded role for political participation. Instead, it suggests that if numerous voters are not motivated by the deliberative elements of participation, plebiscites may be less likely than representational procedures to produce socially optimal results. This would not be the case, however, if the positive, educative or coordinating aspects of consumption voting could be preserved while those aspects that appealed to self-interest, particularly the self-interest of "moral monsters," could be neutralized. I wish to suggest that, at least in some contexts, participatory decisionmaking lends itself to just this mix with respect to decisions made at the local level. The context in which participatory processes seem most promising are those in which both personal and social welfare could be increased by coordination, but in which transactional obstacles frustrate any cooperative solution. In these situations, captured by the logic of the Prisoner's Dilemma,¹⁰⁶ acting cooperatively oftentimes leaves one in a position

104. See *Despite Benefits, Fluoridation Hasn't Yet Swept the Nation*, Wall St. J., Feb. 4, 1986, at 33, col. 1. I am grateful to Richard Bonnie for this example.

105. *Id.*

106. The Prisoner's Dilemma is a classic game theory paradigm involving two suspects under

worse than would be realized by acting selfishly, unless one can be sure that others will also cooperate. The inability to ensure cooperative action by others drives each player to a noncooperative strategy.¹⁰⁷ The problem, then, is to overcome the transactional obstacles to cooperation. If those who recognize that cooperation would advance both self and social interests could be assured either that sufficient others would act similarly, or, at least, that they would not be disadvantaged by cooperating (would not be "suckers"), then they might more readily pursue cooperation. Given that recognition of this solution is likely to be a product of deliberation, conversation, and contemplation, those who actually vote may simultaneously generate superior decisions. In short, there may be reason to believe that those who do opt for participation will choose to exercise that option cooperatively.

Assume, for instance, a neighborhood comprised of individuals living in single-family homes on two-acre lots. Due to appreciating land values, each individual would benefit by erecting a large apartment house on his or her property, as long as few other neighbors also subdivide. If all subdivide, housing demand will still exceed supply, although competition will decrease rents below what they otherwise would have been. Additionally, the effect of any subdivision will be to decrease land values for those neighbors who do not subdivide, as spacious lots become less valuable when situated next to apartment complexes. In this situation, each neighbor is induced to subdivide regardless of the action of neighbors. If one's neighbors fail to subdivide, one is driven to subdivide and earn substantial rental income. If one's neighbors do subdivide, one is also driven to subdivide and earn some rents as opposed to sitting idly by while land values for spacious lots in this now crowded neighborhood decline. Further, the neighborhood would maximize its total value if no one subdivided. Nevertheless (ignoring effects outside the neighborhood¹⁰⁸), because each of

interrogation. If both confess, both will be punished; but if one confesses, he will go free while his confederate will be punished relatively severely. If neither confesses, the police will have sufficient evidence only to convict both on a lesser charge. Thus the Prisoner's Dilemma: self-interest urges him to confess in hope of going free, but if his confederate acts in a similarly self-interested way, then both will be worse off than if neither had talked. See A. RAPOPORT, *FIGHTS, GAMES, AND DEBATES* 173-79 (1961).

107. See M. TAYLOR, *supra* note 67, at 13-18.

108. External effects, especially in cases such as I have posited, may be substantial and adverse from the perspective of the larger society. In the above case, internally motivated exclusionary zoning may adversely affect those unable to obtain housing or other benefits of living in a certain community. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975). Thus, some actions, *i.e.*, those that impose substantial external burdens, are properly beyond the scope of local competence generally. Municipal officials would be no more able to enact legislation imposing such burdens than voters in a participatory process would be. For the moment, therefore, I am assuming that the

the neighbors will realize that it makes sense for him or her to subdivide regardless of what the others do, all (assuming self-interest) will subdivide and thereby produce a socially suboptimal result.

How could the neighbors, if they recognized that self-interest required mutual avoidance of subdividing, accomplish that objective in the face of the contrary strategies that narrow self-interest compels? If the number of neighbors were sufficiently small, they might congregate and discuss the issue and recognize as a collective whole that not subdividing served their joint and several interests. They might then agree to some enforcement mechanism to enjoin any subsequent subdivisions. But the chances of such a collective result are small.¹⁰⁹ Not only do neighbors face substantial barriers to communication, but should they communicate, each faces incentives not to reveal his or her true preferences for not subdividing in order to obtain side payments from those neighbors who want actively to resist subdivision.

Failing communicative opportunities for coordination, the neighbors might agree that some superstructure, government, is required to bind them to their actual preferences and avoid cheating. Representative government might reduce transaction costs of communication sufficiently below those of a joint meeting by all concerned to permit passage of a municipal ordinance banning subdivision. Indeed, government is generally viewed as an effective mechanism for resolving Prisoner's Dilemmas such as the one I have posed, not only by providing a forum for communication, but also by raising the cost (lowering the payoff) of self-interested noncooperation.¹¹⁰

But while sufficient, it is not clear that representative intervention is necessary to resolve the Dilemma. Instead, participatory processes other than mass meetings may be equally effective, even though participants are motivated solely by the self-interest-based consumption benefits of participation. Indeed, localities may be particularly susceptible to certain coordination solutions to a Prisoner's Dilemma. Where those initially caught in the Dilemma interact frequently with others who share their position and where the expectation on all sides is that the relationship is durable, extralegal incentives for cooperation are likely to arise. Incentives for cooperation may be as basic as the

adverse external effects of the example are sufficiently small to keep the activity properly within the scope of municipal affairs.

109. See, e.g., C. GOETZ, *LAW AND ECONOMICS: CASES AND MATERIALS* 35-36 (1984) ("Homeowner Bickering Ends \$100,000 Offer for Houses"). This is not to say that such a collective result cannot be achieved. See *Homeowners Unite in Selling to Developers*, N.Y. Times, Jan. 16, 1985, at 1, col. 3.

110. See R. AXELROD, *THE EVOLUTION OF COOPERATION* 133 (1984); M. TAYLOR, *supra* note 67, at 21-24.

reputational value of not being considered a bad neighbor.¹¹¹ They may also, however, be more complicated: for example, a self-interested actor must consider the ability of neighbors, with whom subsequent interactions are expected, to defect on those occasions if the actor defects from the cooperative solution on this occasion. Thus, each actor has an incentive to cooperate with his or her neighbors, at least until such time as the value of future interactions is sufficiently discounted that current defections are worthwhile.¹¹² This adverse result is likely to arise, for instance, if the actor anticipates moving out of the jurisdiction shortly after a defecting play.

This analysis suggests that the capacity for cooperation would be *enhanced* by increased reliance on the plebiscite for public decision-making. Unless trades are simultaneous, the ability to monitor a trading partner — and thus to trust partners to keep their end of the bargain — depends on the presence of opportunities for punishing chiselers. The occasional plebiscite affords no such ability and thus generates little concern for repercussions from the remainder of the community should a particular segment pursue self-interest on such a singular occasion. Where opportunities for retaliation exist, however, long-term self-interest mandates coordination with others, even at the expense of a short-term personal gain.¹¹³ While those who know that they will leave the community before the next play may have little incentive to follow the cooperative path, the number of such individuals at any given time is likely to be small where plebiscites are frequent. Thus, at least in those situations that involve visible displays of defecting conduct — e.g., school closings, capital improvements that favor one segment of the community — increasing the frequency of plebiscites (opportunities for retaliation) is likely to increase the community's capacity for coordination and compromise.

One may object that reputational concerns and other constraints on defection that rely on fear of retaliation will have little impact

111. See Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 671-85 (1986). Professor Ellickson's article is part of his larger theory that society evolves to a series of wealth-maximizing norms. See, e.g., Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEGAL STUD. 67 (1987). I believe that my argument here is consistent with that theory, though it is not necessary to accept Ellickson's views concerning norms generally in order to accept the argument here.

112. See M. TAYLOR, *ANARCHY AND COOPERATION* 8-9 (1976). Thus, if in my example subdividers will move out of the neighborhood and simply become landlords, the cooperative solution is less likely. It is for this reason that one could not expect the participatory process to form an effective barrier to racial "block busting," even though cooperation (not defecting by leaving a neighborhood as it becomes integrated) would maximize the neighborhood's value.

113. See M. TAYLOR, *supra* note 67, at 65-66; R. AXELROD, *supra* note 110, at 10-11; Rapoport, *Prisoner's Dilemma — Recollections and Observations*, in *GAME THEORY AS A THEORY OF CONFLICT RESOLUTION* 27-28 (A. Rapoport ed. 1974).

where residents register their preferences in privacy, *i.e.*, the voting booth. In this situation, one cannot know whether neighbors decided to cooperate or defect, and this ignorance relaxes an important check on incentives to cooperate. Legislators, on the other hand, may register their preferences through roll call votes and are thereby dissuaded from defection. While this argument does accurately reflect a particular advantage of public expressions of loyalty, it implicitly makes two major assumptions, neither of which holds in all cases.¹¹⁴ First, this objection assumes that no visible consequences of private voting reveal how a vote was cast; and second, it assumes that private voting provides no offsetting benefits.

The first assumption may be tested by the Road Repair problem originated by James Buchanan and Gordon Tullock.¹¹⁵ They posit an area in which one hundred farmers live on various roads, the primary purpose of which is to access a main highway. The decision to repair any of the area's roads is made by majority vote, but once a decision to repair is approved, all one hundred residents must contribute to the cost. The authors suggest that a "Kantian" solution would lead road repair to be undertaken only when a road falls to a state of disrepair below the median preference for road maintenance. Nevertheless, "maximizers" would be able to attain supramedian levels of road repair by voting against all proposals to repair roads other than their own and by voting to repair their own roads at each opportunity. Any maximizer would gain the full benefit of a repaired road, but contribute only about one one-hundredth of its cost. Buchanan and Tullock suggest that maximizers would tend to form coalitions that would enable those involved to obtain a superior level of road repair while shifting the costs of the improvements to nonmembers and Kantians. A Kantian, on the other hand, "would never have his own road repaired, but he would have to pay taxes for the support of other local roads."¹¹⁶ The result would be a suboptimal arrangement in which substantial resources were invested in attempting to form coalitions and strike bargains that expropriated the wealth of neighbors.

Even maximizers, however, may behave very differently in the Road Repair scenario. Unless the one hundred farmers have little contact with one another, so that their reputations within the community are nonexistent or meaningless, the visibility of their selfish conduct constrains the behavior that Buchanan and Tullock predict. It

114. Of course, if one felt that private voting was a major obstacle to achieving electoral results consistent with public interest, one could advocate that plebiscitary votes be cast publicly.

115. J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* 135-45 (1962).

116. *Id.* at 140.

should be readily apparent who is voting for which road repairs. Indeed, the very visibility of an individual's vote makes possible the monitoring of behavior without which the coalitions necessary to maximizing behavior could not be formed. That same visibility, however, allows those who obtain frequent road repairs to be classified as "bad neighbors." It may be that particular farmers within the community are immune to the implications of such a label. Nevertheless, the case posited by Buchanan and Tullock, a small community of individuals involved in a similar enterprise, seems particularly susceptible to reputational concerns. It is in just such a situation that one would expect to see repeated contacts with neighbors and occasional opportunities for mutual assistance, the very elements that create motives to cooperate rather than expropriate.¹¹⁷ It is true, as Buchanan and Tullock recognize, that short-term gains materialize from behaving as a maximizer. What they consider less, however, is the possibility of long-term gains from cooperation that, even when discounted, deter self-interested farmers from engaging in supraoptimal road repair. Again, this realization occurs not because the maximizing farmers suddenly become Kantians, but because their own self-interest mandates a course of action that preserves their reputation among neighbors.¹¹⁸

Even if reputational concerns generate cooperation, their effects may be reduced as the size of the locality increases. The probability of repeated dealings, or iterations, with one's neighbors declines as population size increases. Thus, Douglas Hofstadter has noted (and I unhappily confirm) that drivers in the Boston area assiduously avoid efforts at cooperation. Once a defecting driver has engaged in opportunistic behavior and cut off or passed by less aggressive (more risk averse, law-abiding, or rational) drivers, opportunity for future interactions, and thus for retaliation, is small.¹¹⁹

Even in the absence of opportunities for retaliation, however, plebiscitary processes may produce a solution to the coordination prob-

117. R. AXELROD, *supra* note 110.

118. Where the consequences of voting are invisible, voting in private contains various advantages, not the least of which is the disincentive it provides to public misstatement of one's position in order to receive payoffs for a particular vote. As noted above, collective action may be frustrated by individuals who understate their preferences for certain services in the hope that they will be able either to free ride off others or receive side payments to induce a particular course of action. Where votes are publicly expressed, these side payments are likely because the payor can monitor the behavior of the payee. Private voting, however, reduces the capacity for monitoring, and thus reduces incentives to hold out or understate preferences in the hope of receiving a side payment. As long as unanimity is not required, moreover, some defections from socially optimal behavior can be tolerated.

119. D. HOFSTADTER, *METAMAGICAL THEMAS: QUESTING FOR THE ESSENCE OF MIND AND PATTERN* 732-33 (1985).

lem. The reason is a subtle distinction between the Prisoner's Dilemma game and the majoritarian nature of the plebiscite. One of the salient features of the Prisoner's Dilemma is that defection rather than cooperation is a dominant strategy; each player is better off defecting, regardless of whether other players defect or cooperate.¹²⁰ Cooperation is penalized unless others uniformly cooperate, since the cooperator invests resources that cannot be recouped if others defect. Thus, the preference of each player is that all others save himself cooperate.¹²¹ In my previous subdivision example, for instance, one who cooperates (does not subdivide) comes out worse if any other homeowner does subdivide. Thus all homeowners are driven to the suboptimal strategy of subdividing.¹²²

What if, however, we could assure each homeowner that cooperation will *not* be penalized because individuals who prefer to cooperate will not be bound unless all cooperate. Since each individual would prefer a situation in which all cooperate to one in which none cooperates, creating expectations about what others will do is likely to generate universal cooperation. No longer are we in a situation in which defection is dominant, *i.e.*, in which it is best to defect regardless of what others do.¹²³ Instead, those who prefer cooperation would be willing to express that preference without fear that defection by others could leave them worse off. A majoritarian voting system produces just that result. A cooperative vote in a plebiscite matters only if sufficient (a majority of) others also vote for the cooperative option. If others vote to subdivide (defect), they gain no advantage over the voter who wishes to cooperate, because the latter is not bound if the majority decision is against his preference. Each voter is able to act with impunity as if he or she had a preference for the cooperative solu-

120. See Campbell, *Background for the Uninitiated*, in PARADOXES OF RATIONALITY AND COOPERATION 3, 16-18 (R. Campbell & L. Sowden eds. 1985); M. TAYLOR, *supra* note 67, at 13-18.

121. See Sen, *Isolation, Assurance and the Social Rate of Discount*, 81 Q.J. ECON. 112 (1967).

122. The result here is more invidious than simple free riding. Where free riding is possible, those who cooperate may not be able to achieve their aims, but they also do not necessarily lose anything other than the benefits that would have materialized had the venture succeeded. Assume, for instance, that a municipality of 12,000 persons seeks to construct an outdoor pedestrian mall at a cost of \$10,000 and pay for it through citizen donations of \$1 rather than through taxes or fees. If all citizens would receive \$2 of benefit from the mall, each would receive a net benefit from contributing. The alternative of noncontribution by all, moreover, would be inferior to the alternative of contribution by all. Nevertheless, each citizen would prefer that only others contribute, since personal gains would thereby be maximized, so that self-interested citizens would fail to contribute and insufficient subscriptions would result. If those (altruists, "suckers") who contribute receive refunds of their contributions should the venture fail, however, they are no worse off than they were previously. In the subdivision situation, however, investment of resources in cooperation leads to net losses should others defect.

123. Sen, *supra* note 121, at 114.

tion. Since the compelling reasons to defect no longer exist, the dominant strategy of defection in the Prisoner's Dilemma is replaced by something like an Assurance Game, in which each player prefers to follow a certain strategy because she is assured that every other player will follow the same strategy.¹²⁴ That assurance seems likely where there is no downside risk to expressing a preference for cooperation. If the Prisoner's Dilemma involved only two players, the possibility of defection by one of them would quickly cause degeneration of the cooperative solution. But where the Dilemma involves numerous players (an *n*-person game), and each is bound to cooperate only if a majority agree, it will not matter that a few residents have incentives to vote for defection. As long as the majority retains an interest in the cooperative solution, cooperation should dominate.¹²⁵ Indeed, as long as a majority of voters act *as if* they prefer cooperation, cooperative solutions will result.¹²⁶

Here lies the final response to Buchanan and Tullock's admonition that maximizing behavior is likely to materialize. They recognize that a particular farmer who takes the attitude, "If *no one* else acts, I shall not act," will not initiate the cycle that ultimately leads to a "maximizing equilibrium" below the social optimum.¹²⁷ Nevertheless, they understate the force of such an attitude. According to Buchanan and Tullock, this attitude would preclude maximizing behavior only if all members of the group assume the attitude and also believe that all other members will share it. Yet these strong criteria, which the authors properly conclude are highly improbable, seem unnecessary where farmers are voting whether to repair a specific road. If majority vote decides the issue, then presumably maximizing conduct, while not precluded, could be rejected by a majority. Thus, it would be sufficient to achieve optimal social results if a majority of farmers took the attitude, "If *a majority* does not act, I shall not act."¹²⁸

Is it possible that such an attitude would evolve within a majority? The answer, of course, is unclear. It becomes more probable as the

124. See Sen, *Goals, Commitment, and Identity*, 1 J.L. ECON. & ORGANIZATION 341, 349-51 (1985); Sen, *supra* note 121. I say "something like" an Assurance Game because in a pure Assurance Game all players in fact have a preference for cooperation. In voting there may be numerous players who do not prefer cooperation. Nevertheless, since majority rules, those who express a preference for cooperation lose nothing if insufficient others cooperate. Should sufficient others cooperate, even those with a preference for defection are bound by the majority decision.

125. Cf. Hardin, *Individual Sanctions, Collective Benefits*, in PARADOXES OF RATIONALITY AND COOPERATION 339, 344 (R. Campbell & L. Sowden eds. 1985).

126. See Sen, *Choice, Orderings and Morality*, in PRACTICAL REASON 54, 60 (S. Körner ed. 1974).

127. J. BUCHANAN & G. TULLOCK, *supra* note 115, at 141.

128. *Id.* at 142-43.

strong assumption of self-interest is relaxed to permit voters to consider their neighbors' as well their own welfare. The same effect may be accomplished, however, by retaining an assumption of self-interest but incorporating a high payoff for reputation as a cooperator. In either situation, the likelihood that the necessary conventions will evolve seems most probable within the confines of a locality. Thus, Jane Mansbridge concludes that the small size of jurisdictions able to benefit from direct democracy "and the potential for greater empathy among their citizens also make them more likely to approach a genuine common interest."¹²⁹ Should this empathy materialize, raw majoritarianism becomes less of an evil than the criticism of plebiscites suggests. The empathetic solution, however, requires relaxation of the self-interested view of voters. The possibility of Assurance Game results, on the other hand, suggests that even self-interested voters could reject the "maximizing" solution because they would (self-interestedly) prefer that no one maximizes and could vote that preference without fear of adverse consequences should they be joined by only a minority of their peers.

D. *The Plebiscite, Logrolling, and Compromise*

The continuity of the community suggests a response to another alleged institutional defect of the plebiscite. One of the perceived corollaries to the deliberative capacity of legislatures is their tendency to achieve compromise. This result may be effected in either of two forms. Logrolling permits explicit vote trading so that individuals who are unconcerned about particular issues may exchange votes with others in return for support on matters of greater personal importance. Public choice models of government suggest that vote trading may generate mutual advantages for all traders insofar as it permits parties to exchange one set of preferences for another.¹³⁰ Indeed, Frank Michelman has attempted to explain, in public choice terms, a series of Supreme Court cases restricting referenda by arguing that the inability of the electorate to "dicker . . . for support now in exchange for your support on something else later" undermines the "legitimacy" of plebiscites.¹³¹

Those who consider logrolling a value-creating mechanism, however, assume that the legislature is the sole forum where trading can

129. Mansbridge, *Living With Conflict: Representation in the Theory of Adversary Democracy*, 91 *ETHICS* 466, 475 (1981).

130. J. BUCHANAN & G. TULLOCK, *supra* note 115, at 122-23.

131. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *IND. L.J.* 145, 182 (1977-1978).

effectively occur.¹³² The legislature alone has the capacity to indulge the “transactional assurance — the assurance from log-rolling — of broadly distributed long-run net benefits from public action.”¹³³ On this view, legislators, limited in number and scheduled to convene at specific times and places, not only overcome the obstacles to mass meetings, but also have incentives to compromise. Continuation in office and advancement to higher office depend largely on an ability to further the interests of constituents. Action that imperfectly coincides with constituents’ preferences is more likely to appeal to voters than inaction. Thus, if compromise can effect more action, legislators are likely to find compromise useful. Further, trading can occur only if the same potential traders are involved in multiple transactions, either sequentially or simultaneously. Unless there exists substantial ability to monitor a trading partner’s subsequent behavior and punish chiselers, one would anticipate that only simultaneous trades would occur. Monitoring and retaliation may be possible in a legislature, where defections can be observed and redressed. Voters who cast votes on only a single issue, such as in a plebiscite, however, cannot make binding promises about votes in subsequent issues on which they might be willing to trade, because those subsequent issues cannot be assured to materialize.¹³⁴ Even those explicit bargains that could occur in a plebiscitary forum would be deterred by the inability to police any promisor’s performance in the privacy of the voting booth.

I believe that both the premise and conclusion of this argument for the superiority of legislative compromise is seriously flawed. The premise of logrolling states that the practice increases value because it gives those with the highest intensity of preference control over an electoral outcome.¹³⁵ Logrolling creates incentives for representatives to act even with respect to matters in which they have very little interest. If votes are taken on such issues at a time when the representative is already present to vote on a matter of greater personal interest, the cost of casting a vote on the former issue is quite low. Failure to cast any vote may expose the representative to charges of absenteeism or shirking. In such a situation, logrolling may indeed enhance value by directing those who would vote in any event to do so in a socially optimal direction. Plebiscitary voting, however, appears to be a similarly effective mechanism for reflecting relative intensity of preference.

132. See, J. BUCHANAN & G. TULLOCK, *supra* note 115, at 132-35.

133. Michelman, *supra* note 131, at 182.

134. But see J. BUCHANAN & G. TULLOCK, *supra* note 115, at 120-21 (suggesting that logrolling can occur when decisions are spread over time).

135. *Id.* at 132-33.

The consumption benefits explanation of voting requires that those who have little interest in the outcome will simply not vote at all. Even where referenda are voted simultaneously with other issues, voters already in the booth may ignore plebiscitary propositions, since they cannot trade for someone else's vote on a matter of greater personal importance.¹³⁶ If individuals with little interest in the outcome of a ballot proposition are unlikely to vote on an issue, then the fear that issues will be decided by those without strong preferences seems unjustified.

Apart from the practical need for logrolling, the argument that plebiscites lack devices for compromise seems fundamentally flawed. The argument presumes compromise to be a good, a political quality to be fostered. This contention overstates the vitality of compromise. Compromise is useful insofar as it allows the formation of majorities over discrete issues and thereby forestalls paralysis by those who wish only particular courses of action. In Hirschman's terms, compromise reduces transportation costs, the distance anyone has to travel in order to accept a position.¹³⁷ Compromise, however, is unavailable in the myriad situations where political choices rest on binary alternatives.¹³⁸ The question in these situations is less one of implementation, a matter on which compromise is possible, and more one of whether to pursue a course of conduct at all. If these situations are subjected to a plebiscite, therefore, the relative inability of the populace to achieve compromise is irrelevant.

Nor is compromise necessarily as difficult to achieve in the plebiscitary process as Michelman suggests. Individual voters are not prevented from engaging in reflective processes *prior* to voting. Proponents of an initiative or referendum measure surely understand

136. My evidence on dropoff rates is largely anecdotal, and I am unsure what to conclude from it as a matter of statistical significance. In 1986, Massachusetts voters had opportunities to elect a governor and to vote on six statewide questions. Approximately 1.7 million votes were cast for governor. Between 92% and 98% of that total were cast for the questions. *Boston Globe*, Nov. 6, 1986, at 23, col. 2. In 1984, voting on local questions ranged from 41% to 99.5% of the votes cast for President by residents of those localities. The median appears to have been about 85%. *Boston Globe*, Nov. 8, 1984, at 44, col. 4. Magleby reports somewhat higher drop-off rates for Californians in the 1976 general election. He indicates that of those who voted for president in that year, between 80% and 95% voted for various statewide propositions. See D. MAGLEBY, *supra* note 28, at 91.

137. A. HIRSCHMAN, *supra* note 57, at 66-67.

138. Such a zero-sum game characterizes numerous local plebiscites. Questions about fluoridation of local water supplies, funding construction of a local stadium, granting licenses to veterans' organizations, and permitting pari-mutuel betting can only be resolved by yes-no voting. On strategies to resolve binary choice, zero-sum games, see R. LUCE & H. RAIFFA, *GAMES AND DECISIONS* 90-91 (1957). Where money issues are at stake, compromise may be an effective mechanism for achieving optimal results. But, for other reasons, these issues are not easily susceptible to plebiscitary processes. See text at notes 190-91 *infra*.

the yes-no nature of the choice with which they will confront voters. The effect of that limited choice is necessarily mollifying. If the measure is to attain sufficient support, it may have to take a form more moderate than the one favored by its most zealous advocates. In order to achieve some semblance of victory, they must reduce the transportation costs of less radical voters. Initial legislative proposals that are subject to subsequent debate and modification in the legislative forum may, on the other hand, initially be stated in extreme form precisely because there are subsequent opportunities for compromise and moderation. Advocates may hope to attain the closest approximation of their ideal by beginning with more radical proposals and giving up only what is necessary for passage. Thus, the very possibility of incremental changes through compromise induces more radical proposals at the start. The availability of compromise, in short, creates the need for it. One cannot, therefore, assume that propositions submitted to binary choices without opportunities for subsequent compromise are necessarily of less general appeal than those ultimately passed by legislative processes.

If we relax the assumption of this section that legislators always act in a manner that reflects their conception of public interest, the motivation that makes legislative compromises easy also renders their substance suspect. The repeat play of legislators is conducive to the formation of coalitions that may serve the members' interests rather than those of the represented. Self-interested legislators may reach inappropriate compromises or reject appropriate ones because contrary decisions conflict with selfish opportunities for advancement. While the logrolling that generates these coalitions may be value-enhancing from the perspective of the individual members, there is no reason to believe that logrolling also enhances value at the social level. Indeed, some state constitutional prohibitions on legislative action may best be understood as reactions to concerns that coalitions could be easily formed in a manner that would reduce social welfare. The common bar on special legislation, for instance, can be understood as a means to prevent representatives of one locality from trading votes with disinterested representatives from other localities to obtain support for a measure that would benefit the former by an amount less than the aggregate of losses to other localities, but substantially greater than the loss to any other individual locality.¹³⁹

139. Assume, for instance, that passage of special legislation would benefit locality *A* by 10 and would cause localities *B* through *Z* losses of 1 each, for a total loss of 25. Assume further that locality *B* desires the vote of the representative of *A* on a matter that would benefit *B* by 5, but will inflict on the rest of the state a total loss of 8. *A* and *B* should be willing to trade votes,

Outside of coalitions, legislators who hold marginal votes may be able to extract substantial prices for their support. They, in effect, hold monopoly positions available in hold-out situations generally.¹⁴⁰ While the net social gain from legislative compromise may still prove positive, it may be smaller than the gain that would have been provided by the less interactive compromises that characterize plebiscites.

E. *Collective Action and Time Horizons*

If we accept the assumptions of a publicly interested body of legislators and a self-interested electorate, however, Michelman initially seems correct in one respect — representatives appear to possess a greater capacity than the electorate to consider “long-term effects” and thus achieve results that approximate the socially optimal. Coordination becomes less compelling as a solution in this situation, as self-interested voters would presumably either fail to take adverse long-term social effects into account (if they were certain they would be gone from the locality when those effects materialized), or discount those effects to reflect uncertainty about being in the municipality when the effects materialized. In either case, voters would be likely to overvalue a proposal’s short-term benefits and undervalue its long-term costs. A substantial literature suggests that legislators and local officials suffer from the same skew in comparing intertemporal costs and benefits.¹⁴¹ Preoccupation of local officials with success at the next election generates a bias in favor of projects that promise benefits in the short term. Long-term costs are likely to be heavily discounted because officials will not be in office to absorb the blame when those effects materialize. For current purposes, however, I have assumed the existence of publicly interested legislators. Thus, plebiscitary deci-

and thus enhance the probability each measure will pass, even though the measures produce a net loss to the state.

140. See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106-07 (1972). The Tax Reform Act of 1986 provides one possible example of this phenomenon. The House bill that became the Act contained numerous provisions that appear to assist a small number of taxpayers (*i.e.* one). One interpretation of these provisions is that they were inserted at the insistence of a particular legislator in return for support of the Act as a whole. See Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, §§ 633(e), 657(a), 1317.

141. See Gellis, *Mandatory Disclosure for Municipal Securities: A Reevaluation*, 36 Buff. L. Rev. 15, 46-47 (1987); Gillette, *Fiscal Federalism and the Use of Municipal Bond Proceeds*, 58 N.Y.U. L. REV. 1030, 1060-64 (1983). These incentives may also skew decisionmaking by corporate managers who wish to demonstrate profits each quarter. See R. CYERT & J. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* 119 (1963); Henderson, *Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality*, 58 N.Y.U. L. REV. 765, 780-82 (1983); Robinson, *Probabilistic Causation and Compensation for Tortious Risk*, 14 J. LEGAL STUD. 779, 784-85 (1985); Hayes & Abernathy, *Managing Our Way to Economic Decline*, HARV. BUS. REV. July-Aug. 1980, at 67.

sions with substantial intertemporal effects can be endorsed only if voters, like (fictional) publicly interested legislators, consider long-term costs.

Curiously, the plebiscite's expected favoritism of short-term benefits at the expense of long-term costs arises with less than expected frequency. The primary evidence of this phenomenon emerges from bond elections. If voters act from narrow conceptions of self-interest, one would expect a high acceptance rate for bond referenda in which voters decide whether or not to fund municipal improvements with long-term debt. These referenda systematically favor the short-term, as the improvements are expected to materialize within a few years after approval, while payment is spread out over the useful life of the funded project. Short-term benefits, therefore, are likely to exceed short-term costs. It is future generations of residents who bear the downside risk of these investments, as risks of failure or of a lack of need for the project are more likely to materialize with the passage of time. Indeed, concern for favoritism of the short-term may well underlie the requirements in numerous jurisdictions that long-term municipal debt be approved by a supermajority of the electorate.¹⁴² Similarly, commentators have suggested that local officials will overinvest municipal resources in debt issues because they will receive the credit for capital improvements, but will likely no longer be in office should the consequent risks of liability or higher interest rates materialize.¹⁴³

Nevertheless, bond referenda are not systematically approved by the public. Instead, they are defeated with substantial regularity. Various explanations may exist for this disapproval. It may be that short-term gains are too minuscule even to outweigh short-term costs. Residents may expect to remain in the municipality for a substantial period of time, and thus believe that they will ultimately bear the full costs of the project.¹⁴⁴ If residents with expected longevity constitute a substantial share of the electorate, their self-interested decisions may generate results that reflect total costs (both short- and long-term) as well as total benefits. Alternatively, it may be that those who stand to lose from passage of the proposal turn out to vote in greater percentages than those who stand to gain. The former may constitute a more or-

142. See, e.g., *Gordon v. Lance*, 403 U.S. 1 (1971); WASH. CONST. art. VIII, § 6.

143. See A. WALSH, *THE PUBLIC'S BUSINESS*, 162 (1978); Gillette, *supra* note 141, at 1063.

144. Obviously, this effect will vary with the period for which the debt is expected to be outstanding. Capital improvements that are financed over a three-year period, for instance, may receive more public scrutiny than projects to be financed over a forty-year period, even though the annual per capita cost of the two projects is identical.

ganized subgroup of the community and may have more at stake in the result than the latter, so that a significant disparity exists in the motivation to vote.

It may also be the case, however, that voters, or a sufficient segment of them, consider the long-term effects of their decisions on the community at large. In short, rational conduct by voters may cross temporal boundaries; people, acting rationally, may fail to discount future adverse effects to present value.¹⁴⁵ While one need not abandon the assumption of self-interest to achieve this result, it does require some expansion of the term. It suggests that individual self-interest is entwined with the long-term interests of one's community. Individuals, on this view, develop long time horizons in which they consider the effects of current action. If voters systematically act in this way, there seems little reason to treat their decisions with greater distrust than those that are legislatively approved. Perhaps one test of this hypothesis would be to examine the rates of passage of bond elections for debt with various terms. If voters act with concern for future residents, one would expect that relatively short-term debt would pass at about the same rate as longer term debt. Otherwise, one would expect that longer term debt would be approved at a higher rate, since part of the cost will be borne only by future residents. There could be alternative explanations for any such differential, *e.g.*, improper discount rates applied by current residents. Nevertheless, analysis of relative rates of passage might provide some information about claims that voters internalize costs and benefits over a time period shorter than that considered by representatives.

Even if voters are inattentive to long-term costs, their decisions may be no more skewed than those of representatives. To explore this possibility, we must relax the assumption of public interest among the latter group. As I have indicated above, a substantial literature raises the spectre of a legislature too attentive to the next election to consider long-term costs of projects. Implicit in this view is a conception of an electorate with a short time horizon; otherwise the electorate would decline to reelect representatives who ignored long-term costs. If this is the case, plebiscitary decisions still may be *no worse* than representative decisions from the perspective of intertemporal costs and benefits. While this comparison provides scant praise for the plebiscite, it does challenge Michelman's initial conclusion about the comparative superiority of legislative judgments. Any inference drawn from this self-interest model of legislatures, however, requires a more thorough ex-

145. See D. PARFIT, *supra* note 70, at 356-57, 480-86.

amination of the capacity of interest groups to capture both legislatures and the electorate, an issue to which I now turn.¹⁴⁶

III. INTEREST GROUPS AND MINORITY CAPTURE OF PLEBISCITES

Ballot propositions do not appear magically. They arise because a particular group has been willing to dedicate the time and effort necessary to place the issue before the electorate. As most jurisdictions require petitions to bear the signatures of a substantial number of voters before a proposition may be placed on the ballot, the costs of placing plebiscitary proposals on the ballot may be significant.¹⁴⁷ The public goods nature of legislation, however, suggests that even those who would benefit from particular legislation would be unwilling to initiate the plebiscitary process, as they would obtain the same benefits should they do nothing and others — who would similarly gain — fill the void. Thus, one would predict that plebiscites will be initiated by those with idiosyncratic interests in securing the legislation. That these individual interests are so substantial as to make the costs of the plebiscite worthwhile, however, may indicate that the underlying legislation deviates substantially from what would serve the public interest. In short, one group may be attempting to expropriate wealth from nongroup members, although the former's use of such wealth will not return greater social benefits. Furthermore, it seems likely that these idiosyncratic interests will be overrepresented among actual voters. If the costs of mounting the plebiscitary campaign are worth undertaking, net expected benefits are unlikely to be exceeded by the additional costs associated with voting for the proposal. Conversely, those who would be adversely affected by passage of the proposition may not suffer sufficient individual losses to make voting worthwhile. These tendencies are exacerbated by the willingness of proponents of the measure to convince potential voters — through advertising and other forms of persuasion — that passage is in their (the voters') best interests, while those less interested in the outcome have less reason to convince potential voters to do otherwise. For instance, if a municipal

146. I am reluctant to draw support for the propositions in this section from studies of the efficiency of direct democracy, particularly those predicated on elections in other countries. It is somewhat comforting, however, to have discovered a study by Eli Noam, based on referendum voting in Swiss cantons, that suggests few (5%) inefficient results, defined as defeat of propositions notwithstanding that majority gains from passage would have exceeded minority loss. See Noam, *The Efficiency of Direct Democracy*, 88 J. POL. ECON. 803 (1980). While this finding may provide precious little support for my own theory, a contrary finding would have presented a formidable obstacle.

147. These costs may be incurred either through direct collection of signatures by advocates of a proposition or through monetary payments to professional agencies that collect signatures for a fee. See D. MAGLEBY, *supra* note 28, at 61-65.

expenditure will generate one million dollars in revenue to a private developer, but will raise any one resident's tax rates only minutely, the developer has substantial motivation to secure passage of the authorizing legislation, while no resident would obtain net financial gains from opposing it. Thus, the same rationale that suggests majorities will not vote also suggests that minorities will be able to capture the political process and enact legislation that satisfies their narrow interests. While the prospect of deliberative voting may address the need to coordinate self-interested actors, diffusion of cooperators may produce insufficient incentives to address the problem of expropriation. This, in brief, is the concern about interest group capture of the plebiscitary process.¹⁴⁸

Analyzed in a vacuum, there appears to be substantial reason to fear minority capture of the plebiscite. Given the proclivity of voters to avoid special interest elections (e.g., bond elections), one would imagine that even those who otherwise feel duty-bound to vote are less motivated to turn out in these plebiscites.¹⁴⁹ Thus, referenda and initiative elections may be particularly susceptible to capture by interest groups. Indeed, the possibility that special interests could use propaganda to convince those predisposed to vote but less concerned about the underlying position for which they were voting has generated substantial calls for limits on financing plebiscites.¹⁵⁰

Missing from this account, however, is an understanding that interest group capture of the plebiscite does *not* occur in a vacuum. The normative force of the objection must face three issues: the ability of plebiscites to further public interest; the relative capacity of interest groups to influence legislators as opposed to the electorate; and the capacity of other institutions (the judiciary in particular) to neutralize the influence of interest groups. If groups that advance plebiscites are actually serving public interest, or if legislators are similarly susceptible to capture by interest groups, or if there exist external constraints

148. See D. MAGLEBY, *supra* note 28, at 29-30; Bell, *supra* note 28, at 13-15.

149. It is somewhat ironic that voters flock to the polls in greater numbers for those elections in which their votes are less likely to make a difference, e.g., presidential or other federal elections. This anomaly is inconsistent with the hypothesis that people vote only to bring about a certain electoral result.

150. See D. MAGLEBY, *supra* note 28, at 145-51; Lowenstein, *supra* note 30; Mastro, Costlow & Sanchez, *Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to Do About It*, 32 FED. COMM. L.J. 315 (1980); Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. MIAMI L. REV. 377 (1985). See also *First Natl. Bank v. Bellotti*, 435 U.S. 765, 768 (1978) (striking down a Massachusetts statute which prohibited corporate expenditures for the purpose of "influencing or affecting the vote of any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation").

on the capacity of interest groups to secure overrepresentation at the polls, then concerns about minority capture may be less meritorious.

A. *Plebiscites in the Public Interest*

It seems doubtful that someone acting in the public interest would undertake the costs necessary to mount a successful plebiscitary campaign given traditional understandings of free riding and collective action. Since the public benefits of legislation would accrue without any contribution on the part of beneficiaries, as long as others undertook to enact the legislation, there is little incentive for any proponent to act at all. At best, the costs may be worthwhile to a political entrepreneur who hopes to enhance his own career through the success of an organization with which he is associated,¹⁵¹ or by serving as a symbol around which diffuse, nonorganized individuals can coalesce. For instance, students of collective action have suggested that Richard Nixon and Edmund Muskie appealed to the environmental movement not so much out of concern for the environment as to enhance their support from environmentalists.¹⁵² Since the sine qua non of entrepreneurship is self-interest, however, any deviation between the interests of promoters of a ballot proposition and public interest is likely to be resolved in favor of the former.¹⁵³ Similarly, there can be little assurance that an entrepreneur whose political goals have been achieved will continue to advance the objectives of the group. Retention of office or advancement to higher office may require or permit attention to interests different from those that placed the political entrepreneur in office initially.¹⁵⁴ If candidates are willing to act in this manner, there is little reason to believe that those who head plebiscitary campaigns would have different, more publicly interested motives.

Alternatively, true "grass-roots" movements may reflect that the costs of political action, though high, are worth taking, because the personal costs of collective inaction are even higher. Where personal costs of organizers coincide with social costs of inaction, self interested conduct may serve social welfare generally. Here, we might return to Hirschman's theory that political action may be born of disappointment, or, more specifically, of a concern for deterioration in a group of

151. See N. FROHLICH, J. OPPENHEIMER & O. YOUNG, *supra* note 37, at 6-8.

152. See R. HARDIN, *supra* note 20, at 35-37; Elliott, Ackerman & Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 333-38 (1985).

153. See N. FROHLICH, J. OPPENHEIMER & O. YOUNG, *supra* note 37, at 8-9.

154. See, e.g., Kau & Rubin, *Self-Interest, Ideology, and Logrolling in Congressional Voting*, 22 J.L. & ECON. 365 (1979) (importance of personal ideology rather than constituents' interests in congressional voting behavior).

which one is a member.¹⁵⁵ Other things being equal, the rational reaction to such a situation may be exit from the group, or, in the case of localities, migration to a more compatible jurisdiction. Other things, however, are not always equal; the costs of exit — leaving familiar jobs, schools, or neighbors — may be substantial. Reactions of individuals in such situations may be to “grin and bear it,” to deny the existence of the problem,¹⁵⁶ or — should the costs of inaction be both personally severe and difficult to deny — to take ameliorative action. The last option, of course, will confer benefits on noncontributors, and thus may be disfavored. In some situations, however, that effect is overridden by the personal gains to the actor.

An example of such a situation may be found in James Krier and Edmund Ursin’s account of the development of political responses to motor vehicle air pollution in California. They suggest that barriers to addressing pollution through collective action among citizens were overcome by the emergence of crises that made the costs of inaction particularly salient. One relatively effective citizens’ group with long-standing participation in the creation of pollution policy was founded by

a Beverly Hills mother [who] had to rush her young child to a hospital as a result of an asthma attack brought on by smog conditions. Advised by the child’s doctor that it would be best for the family to leave Los Angeles, the mother “‘decided instead to stay and do something about air pollution.’”¹⁵⁷

While such groups may lack the “energy and resources to organize major lobbying efforts,”¹⁵⁸ the costs imposed on them by “public bads” may be sufficient to induce their participation in the creation of public goods, notwithstanding traditional free riding obstacles.

The citizen groups studied by Krier and Ursin primarily served as lobbyists; similar groups, however, may channel their energies into lawmaking through plebiscites. Where exit costs are high, voice options may take various forms in an effort to remedy the cause of dissatisfaction. If initial expressions of concern — mere complaints — evoke insufficient response from those in a position to ameliorate the situation, the next level of voice may mandate direct action by the disgruntled. In this vein, it is possible to view recent “tax revolt” plebiscites, typically initiated by citizen groups, less as an effort by nar-

155. See A. HIRSCHMAN, *supra* note 57.

156. The reaction of dissonance is explored in A. HIRSCHMAN, *supra* note 57, at 93-96; Ackertlof & Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 AM. ECON. REV. 307 (1982).

157. J. KRIER & E. URSIN, *supra* note 78, at 272.

158. *Id.*

rowly self-interested individuals to minimize social services than as an attack on uncontrolled governmental expenditures or imbalance among sources of revenue.¹⁵⁹ If the objectives of these movements satisfy our conception of public interest, then any attempt to restrict plebiscites must consider the cost of their elimination.

B. *Legislatures and Electorates as Targets of Capture*

Not all grass-roots movements for plebiscites emerge from public interest, of course. A desire by one group to expropriate the wealth of another may also underlie attempts to alter the status quo. The proposed closing of a neighborhood school, for instance, may impose substantial costs on parents who would be required to transport their children elsewhere and who fear the disintegration of other aspects of their neighborhood. While these expected costs may be insufficient to overcome the substantial barriers to exit, they may be sufficient to induce organized behavior, including petitioning for a referendum.¹⁶⁰ Nevertheless, there is little reason to believe that groups formed in this manner are attempting to vindicate any broader interests than those of their own neighborhood. These groups, therefore, do not vary in perspective from more traditional interest groups that represent the financial interests of their membership. Yet even if these groups have the resources necessary to gain access to plebiscitary processes, that avenue becomes a source of concern only if the plebiscite is more susceptible to interest groups than is the legislature.

Certainly, a rich literature suggests that legislative action is systematically undertaken at the behest of special interest groups rather than in furtherance of the public interest.¹⁶¹ The explanation for this phenomenon lies in an understanding of legislators as rational self-interested actors rather than pure altruists. As in any relationship between a principal and a self-regarding agent, there is likely to be some divergence of interest between legislators and their constituencies. Ideally, any divergence is minimized by a legislator's desire to retain electoral support or attain higher office. Outside the realm of the

159. See Davis, *A Brief History of Proposition 2 1/2*, in *PROPOSITION 2 1/2: ITS IMPACT ON MASSACHUSETTS* 3, 4-5 (L. Susskind ed. 1983).

160. See *Moore v. School Comm. of Newton*, 375 Mass. 443, 378 N.E.2d 347 (1978).

161. See, e.g., R. CASS, *REVOLUTION IN THE WASTELAND* 38 (1981) (legislative votes likely to be predicated on relative intensity of expressed interests rather than majority opinion); Macey, *supra* note 10; Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Barro, *The Control of Politicians: An Economic Model*, 14 PUB. CHOICE 19 (1973). For expressions of faith concerning legislative solicitude for the public interest in at least some legislative action, see Kalt & Zupan, *supra* note 49; Verba & Orren, *The Meaning of Equality in America*, 100 POL. SCI. Q. 369 (1985).

ideal, however, there remain situations in which representatives can ignore the interests of constituents with relative impunity.

The first such situation is where free riding will be prevalent in the electorate. As noted above, only those most interested in a particular piece of legislation — those to whom the costs of expressing preferences and seeking legislative approval are worth the benefits — will actually engage in the lobbying efforts necessary to secure passage. Legislators seeking electoral support presumably will be attentive to lobbying efforts, as the lobby has evidenced its willingness to advance or withhold support in the legislators' subsequent efforts to retain or advance in public office.¹⁶² Legislation procured in this manner, of course, need not coincide with public interest, but only with the interest of the particular group involved in lobbying. Nevertheless, a legislator who votes based on the entreaties of lobbies will not necessarily adversely affect his or her prospects of reelection. If the adverse public effects of the legislation are diffuse, contesting the legislation will not be worthwhile to any adversely affected individual, even if aggregate costs outweigh aggregate benefits.¹⁶³ Nor will support of a particular piece of special interest legislation necessarily cost the legislator much support in the voting booth, even among those who identify the conduct as a defalcation. Representatives must be voted for on the basis of the package of programs they support; voters cannot pick and choose among the various issues for which a legislator stands. Thus, a vote on any particular piece of special interest legislation is unlikely to offend sufficient numbers of voters to affect chances at reelection.¹⁶⁴

Secondly, some legislators are beyond simple electoral control. Most obviously, this phenomenon occurs when a politician is serving what is anticipated to be his or her "last" term and thus need not account to the electorate for actions taken during the period. This is not to say that even self-interested legislators will consistently ignore the public interest. Exogenous constraints may prevent wholly self-interested conduct by the representative even during an ultimate term:

162. Krier & Gillette, *The Un-Easy Case for Technological Optimism*, 84 MICH. L. REV. 405, 423-24 (1985); D. PARFIT, *supra* note 70, at 64.

163. In an extreme example of this phenomenon, H. Ross Perot, a wealthy businessman, contributed \$27,000 to legislators who were influential in adding to a tax bill a provision that would have provided him, and very few, if any, other individuals substantial tax benefits — \$15 million in Perot's case. See R. HARDIN, *supra* note 20, at 78.

164. Incumbents appeal to voters for reasons having little or nothing to do with the positions taken by the incumbents on the issues of the day. See, e.g., Samuelson, *A Test of the Revealed-Preference Phenomenon in Congressional Elections*, 54 PUB. CHOICE 141 (1987). For a recent description of incumbents' capacity to achieve reelection notwithstanding deviations from the interests of constituents, see *Incumbent Lawmakers Use the Perks of Office to Clobber Opponents*, Wall St. J., Mar. 22, 1988, at 1, col. 1 (recent reelection rate of 98% in the House of Representatives).

fear of conviction may dissuade bribery or blatant conflicts of interest; concern for reputation or (more likely at the national level) a "place in history," or expectation of nonelectoral rewards such as appointive office for good last-term performance, may encourage attention to public concerns.¹⁶⁵ The problem of nonaccountability, however, does indicate that plebiscites are not unique in their vulnerability to special interests.

Finally, incumbents may have opportunities to manipulate voter preferences in order to avoid penalties for self-interested behavior. In a jurisdiction with voters who have heterogeneous preferences, Ferejohn suggests, the incumbent may play off voters against each other, so that a majority will not form to remove the representative from office.¹⁶⁶ Alternatively, representatives may act in a more publicly interested manner as elections approach and avoid the invective of a myopic electorate for earlier defalcations.¹⁶⁷

Both representatives and the electorate, then, are vulnerable to special interests, to the concept of "capture" that has been used to explain administrative behavior inconsistent with public interest.¹⁶⁸ If capture is possible at the legislative as well as the plebiscitary level, however, one might sensibly ask, in which forum is it more likely to occur? The focus of some commentators on campaign finance implies that the electorate is disproportionately susceptible to unreasoned media campaigns, so that well-financed interest groups have less difficulty persuading voters to share their position than do poorly financed grassroots organizations.¹⁶⁹ Nevertheless, even the evidence mustered in support of campaign finance reform is, at best, ambiguous on the issue of electoral susceptibility to confusion and dishonesty.¹⁷⁰

Much of our understanding of collective action suggests a contrary conclusion — that capture would be facilitated by creation of a deci-

165. Barro suggests the use of appointive offices as rewards in order to control politicians in their ultimate term. Barro, *supra* note 161, at 28.

If politicians announced that their next term would be their last (or if they face a statutory limit on the number of terms they can serve), an electorate concerned about unaccountability would not return those politicians to office. Of course, this leads to a lovely Zeno's paradox. Politicians, knowing they will not be returned to office for the "last term" will misbehave, unaccountably, in their penultimate term (actually their last term); voters, sensing this, will not return these politicians to office for their penultimate terms; politicians respond by acting selfishly during the previous term, and so on down the line until no one can be elected to anything. See Ferejohn, *Incumbent Performance and Electoral Control*, 50 PUB. CHOICE 5, 10 (1986).

166. Ferejohn, *supra* note 165, at 21.

167. See Nordhaus, *The Political Business Cycle*, 42 REV. ECON. STUD. 169 (1975).

168. See Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. 3 (1971); Peltzman, *supra* note 161.

169. See sources cited in note 150 *supra*.

170. See Lowenstein, *supra* note 30, at 551-54.

sionmaking body like a legislature. Collective action theory suggests that groups are more likely to coalesce in ways that solve problems of free riding where they are small and insular, thereby facilitating efforts to monitor members' activities and to appeal to unified interest.¹⁷¹ These same features, however, should tend to make small, discrete groups whose members share a common objective (e.g., reelection) more susceptible to the influence of interest groups than atomized individuals. Unlike the electorate (diffuse and relatively disinterested in the benefits that an interest group has to offer), the legislature constitutes a body small in number, easily reachable, and (according to capture theory) seriously interested in the (electoral) benefits that an interest group can offer. Lobbyists are likely to have repeated contacts with legislators, to know their views on a variety of subjects, and to have access that cannot be replicated in the case of individual voters. While few within the population may vote, lobbyists cannot, *ex ante*, distinguish voters from nonvoters and must direct their appeals to all. Thus, to the extent that interest groups engage in lobbying as a means of influencing legislation, they appear to have greater opportunities for success if they need only lobby a discrete and relatively fixed segment of the population — representatives — as opposed to the voting population at large. Representatives may also be more susceptible to entreaties from lobbyists, as interest groups are able to affect opportunities for reelection and advancement. Lobbyists have no comparable threat against the electorate. Therefore, decisions made by legislators may be far more susceptible to interest group pressure than plebiscitary ones.¹⁷² Indeed, the survival in state courts of doctrines long abandoned by federal courts, e.g., substantive conceptions of "public purposes" for which governmental expenditures may be made¹⁷³ and the nondelegation doctrine,¹⁷⁴ reveals a relatively low ju-

171. See, e.g., M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* 53-65 (1965); Ackerman, *supra* note 33, at 724-26. This is not to suggest that large or latent groups are incapable of collective action, only that there are tendencies that favor such action among smaller, insular groups. See R. HARDIN, *supra* note 20, at 38-49.

172. See, e.g., *Gude v. City of Lakewood*, 636 P.2d 691, 694 (Colo. 1981) (local creation of building authority to finance development project for which general obligation bonds had been defeated at bond election by margin of 81% to 19%).

173. Compare *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So. 2d 451 (Fla. 1985); *State ex rel. McLeod v. Riley*, 278 S.E.2d 612 (S.C. 1981); *Brown v. Longiotti*, 420 So. 2d 71 (Ala. 1982), with *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984). For an express statement of concern about local legislatures catering to special interests, see *Tribe v. Salt Lake City Corp.*, 540 P.2d 499, 507 (Utah 1975) (dissenting opinion). More charitable views of the local process can be found in *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981); *City of Charlottesville v. DeHaan*, 323 S.E.2d 131 (Va. 1984).

174. See *Delta Truck Brokers, Inc. v. King*, 142 So. 2d 273 (Fla. 1962); *Miller v. Covington Dev. Auth.*, 539 S.W.2d 1 (Ky. 1976).

dicial opinion of the capacity of legislatures to ignore the entreaties of special interests.

C. *External Checks on Interest Groups*

If this view is correct, it is fair to ask why interest groups ever attempt to enact legislation through plebiscites. One would imagine that they would be better served by appeals to the legislature. Anecdotal evidence suggests that the answer to this apparent anomaly may be that special interest groups initiate plebiscites only after failure to convince the legislature to enact similar provisions. The benefits of particular legislation may be so significant to a particular group that it is worth their efforts to pursue electoral override of prior legislative rejection.¹⁷⁵

Even if that is the case, however, the plebiscite would still warrant substantial criticism for susceptibility to abuse by interest groups, even though legislatures are susceptible to greater abuses. That criticism would be tempered, however, if external constraints limited the adverse effects of interest groups on plebiscites. Here, the constraints may emerge from either of two sources. The first may simply be a competing interest group. Where interest groups exist on both sides of an issue, each group may modify its position to make it more palatable to a range of voters (reducing transportation costs again).¹⁷⁶ And, the advantages enjoyed by a single interest group now dissipate as competing influences from the opposing group are brought to bear on decisionmakers. For example, attempts to confuse or dissemble may prove more difficult as proponents on one side of an issue point out obfuscations on the other side.

Alternatively, courts may provide an additional filter, allowing popular voting only when an issue displays the salient features of visibility and reputation-enhancing that I have argued render a plebiscite particularly likely to reflect public interest. Thus, courts could exclude ballot propositions likely to evoke response only from a group with particularly intense sentiments on one side of the issue or that had no visible results, and thus did not implicate the voters' reputa-

175. See, e.g., D. MAGELBY, *supra* note 28, at 60. Lowenstein implies that plebiscitary proposals have, as a matter of course, been previously rejected by the legislature. He suggests, however, that legislative rejection may actually have been inconsistent with the public interest and that plebiscites may thereby better approximate public interest. This result can be presumed where one-sided interest group lobbying disfavors the plebiscite. See Lowenstein, *supra* note 30, at 567-68. Briffault suggests that California initiatives on tax reform, campaign finance, and reapportionment followed years of legislative failure to address these issues. See Briffault, *supra* note 49, at 1371.

176. See notes 137-38 *supra* and accompanying text (Hirschman on transportation costs); Elliott, Ackerman & Millian, *supra* note 152, at 331.

tions. The doctrinal basis for such judicial intervention lies in the ambiguous standards that currently serve as gatekeepers to the plebiscitary process. Few jurisdictions permit use of the plebiscite on any conceivable issue. State constitutions and judicially developed doctrine have limited use of initiative and referendum power to propositions that are "legislative" rather than "administrative" or "executive" in character.¹⁷⁷ Additionally, most jurisdictions require a referendum before a state or municipality can incur "debt" in excess of a specified amount.¹⁷⁸

The content of these constitutional and judicial limits remains inherently nebulous. Courts have articulated distinctions between legislative and administrative decisions that seem capable of justifying any result they wish to reach on alternative grounds.¹⁷⁹ Treatise statements of the rules contain little to dissipate the fog; instead they cast the rules in ambiguous terms such as "[a]n ordinance is administrative if it is designed merely to enforce or carry into effect a basic policy that has been already established."¹⁸⁰ Obligations that fall within the definition of "debt" obligations are increasingly difficult to characterize in a period of complex financing arrangements.¹⁸¹

Interpretation of these doctrinal requirements is essential if they are to attain any concrete meaning. Presumably, any such interpretation could be predicated on some reasoned analysis of the function of plebiscitary measures. Once the need for a principled interpretation is understood, however, courts could intervene to minimize the risk of one-sided plebiscites by approving only those propositions that shared the salient features (concern for a large proportion of the relevant electorate, implication of residents' reputations, and exhibition of visible

177. See, e.g., *Reagan v. City of Sausalito*, 210 Cal. App. 2d 419, 26 Cal. Rptr. 775 (1962); *Moore v. School Comm.*, 375 Mass. 443, 378 N.E.2d 347 (1978); OHIO CONST. art. II, § 1(f); *Merrynne v. Acker*, 189 Cal. App. 2d 558, 11 Cal. Rptr. 340 (1961).

178. See Bowmar, *The Anachronism Called Debt Limitation*, 52 IOWA L. REV. 863, 863-67 (1967).

179. See, e.g., *Lince v. City of Bremerton*, 25 Wash. App. 309, 607 P.2d 329, 330 (1980) (initiative dealt with legislative issue because it effected "permanent and general change" in city zoning law rather than merely applying current law); *City of North Little Rock v. Gorman*, 264 Ark. 150, 568 S.W.2d 481 (1978) (utility rate schedule deemed "legislative," and hence subject to plebiscite because it prescribes new policy or plan rather than simply pursues a plan already in existence); *In re Supreme Court Adjudication of Initiative Petitions*, 534 P.2d 3, 7 (Okla. 1975) (utility rate schedule deemed "administrative" and hence not subject to plebiscite because rate setting constitutes only a "necessary and incidental adjunct to the power constitutionally granted municipalities to operate a public utility").

180. O. REYNOLDS, LOCAL GOVERNMENT LAW 727-28 (1982).

181. Compare *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983), cert. denied sub nom. *Chemical Bank v. Asson*, 469 U.S. 870 (1984), with *DeFazio v. Washington Pub. Power Supply Sys.*, 296 Or. 550, 679 P.2d 1316 (1984). See Gillette, *Risk of Project Failure and the Definition of "Debt,"* 6 MUN. FIN. J. 311 (1985).

results) conducive to public interest voting. I am not suggesting that courts have systematically used the legislative/administrative dichotomy to permit plebiscites only on issues likely to generate wide-ranging interest and debate.¹⁸² I am willing to assert a weak positive claim that courts have intuitively reached conclusions in which issues of broad interest are more likely to be denominated legislative, while those with limited appeal are more readily classified as administrative. One would expect, for example, that proposed zoning changes affecting an entire community would be subject to a plebiscite, while zoning proposals affecting a small section of the community would not. In the cases that I have randomly reviewed, the courts have tended to reach results that can be reconciled with this standard.¹⁸³ The presence of numerous cases contrary to the standard, however, suggests that the positive claim cannot be very strong.¹⁸⁴ Nevertheless, it seems clear that courts, informed with a theory of referendum and initiative, could use the doctrinal distinction between legislative and administrative issues to permit plebiscites consonant with that theory and exclude only those that were not. This capacity suggests that courts could provide the same sort of checking device on private interest in plebiscitary situations as they do in the legislative arena.¹⁸⁵ Simultaneously, this capacity suggests that fear of minority capture of the plebiscite may be no more justified than similar concerns about legislative behavior.

IV. THE APPROPRIATE SCOPE OF THE PLEBISCITE

None of my arguments suggests that referendum and initiative are appropriate for addressing *all* local issues. Instead, my arguments, if accepted, indicate that popular votes on issues that share certain salient characteristics can be constrained in ways that minimize devia-

182. This is not to say that courts do not occasionally refer to such a standard. *See, e.g., In re Protest of the Referendum Petition Filed with the City Clerk*, 610 P.2d 243, 246 (Okla. 1980) (determining referendum proposal for de-annexation to be legislative because "the addition or deletion of land from the corporate boundaries of a municipality has an impact on the entire community, as opposed to only the individuals directly involved").

183. *See, e.g., Leonard v. City of Bothell*, 87 Wash. 2d 847, 557 P.2d 1306 (1976); *Forman v. Eagle Thrifty Drugs & Markets*, 89 Nev. 533, 516 P.2d 1234 (1973); *Elliott v. City of Clawson*, 21 Mich. App. 363, 175 N.W.2d 821 (1970); *Wheelright v. County of Marin*, 2 Cal. 3d 448, 458, 85 Cal. Rptr. 809, 467 P.2d 537 (1970) (ordinance concerning access road to planned community deemed subject to referendum because "[r]oadways are of sufficient public interest and concern to weight the scales in favor of construing this ordinance as being legislative").

184. *See, e.g., Moore v. School Comm.*, 375 Mass. 443, 378 N.E.2d 47 (1978) (decision to close one school in city deemed legislative, although residents in that school district might have a particularly intense interest in keeping school open). My inability to demonstrate that courts have systematically intuited to this position is also demonstrated by conflicts in judicial decisions that alternatively classify the same issue as legislative and administrative. *See* note 179 *supra*.

185. *See Macey, supra* note 10.

tions from public interest. Those characteristics include group size small enough to permit repeated interactions among identifiable members of the community, consequences that are visible and attributable to particular voting groups, and issues that generate sufficient interest to induce participation by affected parties on all sides.

The negative implication of this analysis is that there are discrete situations in which plebiscites are inappropriate. Let us, for instance, relax the assumption, implicit in the examples up to this point, that local action produces only minimal external effects. If residents of a locality are asked to vote on an issue that would return primarily benefits to nonresidents and would impose primarily costs on existing residents, it is unlikely that they would approve the measure. The opportunities for future interaction with, and hence reciprocity by the excluded group are minimal, so that extralegal incentives to take the concerns of the external group into account would be lacking.¹⁸⁶ Thus, referenda and initiatives that concern exclusionary zoning and that are fraught with racial implications have been the basis on which many commentators have attacked plebiscites generally.¹⁸⁷ Failure to achieve optimal results from the perspective of the broader society, however, does not necessarily represent a failure of the plebiscite. Rather, it may represent the failure of local decisionmaking generally to consider the welfare of nonresidents. It is by no means certain that local legislatures would be more likely to take into account the external effects of proposed ordinances. Indeed, the limitation of most home rule provisions to "municipal affairs," generally defined in a manner that excludes ordinances with substantial extrajurisdictional effects, suggests that even states subscribing to a broad view of municipal autonomy wish to check the exercise of municipal conduct when it adversely impacts nonresidents. It is at this point that some decision-making body representing both the municipality and the affected nonresidents — whether a court or the state legislature — is required to determine the desirability of proposed legislation.¹⁸⁸ Thus, there is substantial reason to question decisionmaking at the local level whenever it addresses issues that generate substantial spillovers.¹⁸⁹ But contrary to what various commentators have suggested, there is less

186. See R. AXELROD, *supra* note 110, at 124-32.

187. See Bell, *supra* note 28, at 6-9; Sager, *supra* note 28, at 1376-418; Seeley, *supra* note 29, at 884-91.

188. See Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643 (1964).

189. See Gillette, *supra* note 141, at 1055-66.

reason to single out the plebiscite as a decisionmaking process particularly inimical to the interests of nonresidents.

Externalities may similarly render plebiscites inappropriate where local action is not informed by prejudice but would frustrate autonomous action by another municipality. Assume, for instance, that we permitted local electorates in an area circumscribing a nuclear power plant to determine a proper plan of evacuation in the event of a nuclear accident. If a northern community decides to evacuate to the south by turning major roads into one-way streets in that direction, while a southern community decides to evacuate to the north, one can expect autonomous action to generate collective impasse. Here again, however, the problem lies not in the plebiscitary basis of the local decision, but in leaving the decision in local hands at all.

It is not only where externalities are significant that plebiscites may be inappropriate. Certain purely internal decisions may be poorly handled by the binary decision process that plebiscitary voting entails. Where numerous issues are integrally related, a decision procedure that considers all the affected issues simultaneously will be superior to one that considers them in isolation. Thus, numerous courts have singled out budget or appropriations decisions as those to which grants of plebiscitary power do not apply.¹⁹⁰ Assuming a fixed budget, a decision on any one expenditure necessarily affects the capacity of the city to consider other expenditures; plebiscites expanding school budgets will necessarily restrict spending on police or fire protection or other services. In such polycentric situations, the legislative forum has the distinct advantage of permitting simultaneous consideration of multiple interests, a role that is less available with decisions of a zero-sum, yes-no variety.¹⁹¹

Where municipal residents propose to express themselves on matters of wide-ranging concern that generate neither substantial adverse spillovers nor potential havoc with budgetary or other polycentric issues, however, there seems little merit to the claim that plebiscites are inappropriate. To the contrary, they may not only provide expressions of public interest as or more powerful than what emerges from representative processes, they may also stimulate the conversation and conduct that underlie arguments for more active forms of participation. While my inquiry has assumed a self interested electorate, relaxation

190. See, e.g., *State ex rel. Card v. Kaufman*, 517 S.W.2d 78 (Mo. 1974); Annotation, *Construction and Application of Constitutional or Statutory Provisions Expressly Excepting Certain Laws from Referendum*, 100 A.L.R.2d 314 (1965).

191. See Gillette, *supra* note 59, at 965-66. See also *Atlantic City Hous. Act. Coalition v. Deane*, 181 N.J. Super. 412, 437 A.2d 918 (1981) (redevelopment process not susceptible to plebiscitary solution).

of that assumption would strengthen the argument. The more we believe that citizens are motivated by disinterested public spirit, the more we might be willing to delegate decisionmaking to them. The more we believe that such public spiritedness would be fostered by systematically conferring on citizens the responsibility for collective concerns, the more local plebiscites appear to be appropriate mechanisms for encouraging deliberation and overcoming tendencies towards expropriation and obstacles to cooperation.¹⁹²

This potential becomes more concrete by examining missed opportunities. During the buildup of American participation in the Vietnam war, residents of Willoughby Hills, Ohio proposed an initiative resolution:

The President of the United States should bring all American troops home from Vietnam now so that the Vietnamese people can settle their own affairs.

After quoting the Ohio Constitution, which provides for local initiative "on all questions which such municipalities may . . . be authorized by law to control by legislative action," the Ohio Supreme Court denied a writ of mandamus to place the issue on the ballot. The court's one-sentence opinion concluded that the petition did not contain any question which a municipality is authorized by law to decide.¹⁹³ Certainly, it is true that neither the legislature nor the people of Willoughby Hills had the authority to withdraw troops from Vietnam. It is less clear that the legislative body would have been unauthorized to pass a resolution on the issue, and that, therefore, the initiative power was unavailable to this end; the constitutional provision can be read to permit a plebiscite on any issue a local legislature may address. But even if the issue is ambiguous, it makes little sense to resolve that ambiguity without examining whether the functions of plebiscitary democracy will be advanced or retarded by the particular proposition. It is difficult to imagine that either side of the troop withdrawal issue would have had a disproportionate interest in expressing its preference. Given the admitted incompetence of the locality to effect withdrawal, it is similarly difficult to comprehend adverse external effects from the vote (national defense being the quintessential public good). What may have occurred was substantial discussion within the locality of an issue of some moment, the very type of deliberation within the

192. For a discussion of how placing responsibility for resolving conflict directly on those involved, rather than on an intermediary such as the state, may beget more altruistic solutions, see M. TAYLOR, *supra* note 67, at 168-75.

193. *State ex rel. Rhodes v. Board of Elections*, 12 Ohio St. 2d 4, 4, 230 N.E.2d 347, 348 (1967) (emphasis omitted).

electorate that proponents of representative democracy consider the hallmark of legislatures.

Would deliberative discussion have ensued? Certainly some believe that discussion of such issues is too driven by passion to be trusted to the electorate. A similar petition to place on the ballot in New York City a plebiscitary proposal to create a municipal office of the Anti-Vietnam War Coordinator was also denied as outside the traditional functions of local government.¹⁹⁴ Here, again, the issue of the scope of municipal affairs is subject to some debate; the proposed officer would have had no duties other than to express the will of residents of New York City. More fundamental concerns appeared to be at stake: "The painful emotions of war," the judge concluded, "increase the need for perspective and for calm, reasoned thought."¹⁹⁵ Representatives, but not the people at large, were capable of such equanimity. Thus, this position suggests, even if we provide avenues for electoral deliberation, voters would fail to seize the opportunity. Ultimately, our perception of the plebiscite must be guided by our approval or disapproval of this attitude. My sense, expressed in these pages, is that — even viewed through the lens of public choice and self-interest — it is seriously misguided.

194. *Silberman v. Katz*, 54 Misc. 2d 956, 283 N.Y.S.2d 895, *aff'd.*, 28 A.D. 992, 284 N.Y.S.2d 836 (N.Y. Sup. Ct. 1967).

195. 54 Misc. 2d at 962, 283 N.Y.S.2d at 901.